

ELECTIONS BC

A non-partisan Office of the Legislature

**Report to the
Honourable Speaker of
the Legislative Assembly
of British Columbia
regarding**

an application by

**Leonard Friesen
Holly Kuzenko
Mildred Umbarger**

to challenge the 1996 election of

**Sue Hammell
Graeme Bowbrick
Ed Conroy**

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March 30, 2001

The Honourable Bill Hartley
Speaker of the Legislative Assembly
Legislative Assembly of British Columbia
Room 207, Parliament Buildings
Victoria, British Columbia
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Honourable Speaker:

I have the honour to submit to you my Report to the Legislative Assembly of British Columbia regarding an application by Leonard Friesen, Holly Kuzenko and Mildred Umbarger to challenge the election of Sue Hammell, Graeme Bowbrick and Ed Conroy at British Columbia's 1996 Provincial general election.

This report respecting the application and the decision of the Court is presented in accordance with sections 153(1) and (2) of the *Election Act*, R.S.B.C. 1996 c. 106.

Yours very truly,

Robert A. Patterson
Chief Electoral Officer

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Introduction

On August 27, 1996, Leonard Friesen, Holly Kuzenko, Mildred Umbarger, and the members of the class of persons caused to vote for the candidate of a particular political party in the General Provincial Election held on the 28th day of May, 1996 as a result of the violation of section 256 of the Election Act of British Columbia ("the Original Petitioners"), filed a Petition and supporting materials in the Supreme Court of British Columbia in which all of the then sitting Members of the Legislative Assembly for the governing New Democratic Party, and the New Democratic Party of British Columbia itself, were named as Respondents. The Petition sought an Order declaring the elections of the Respondent Members of the Legislative Assembly to be invalid.

On August 3, 2000, the Honourable Madam Justice Humphries of the Supreme Court of British Columbia, ordered that the aforesaid Petition be dismissed. No appeal from the Order of the Honourable Madam Justice Humphries has been filed by any party.

Nature of Application

The application of the Original Petitioners was made by way of a Petition to the Court and sought relief pursuant to sections 150 and 256 of the *Election Act* and the provisions of the *Class Proceedings Act* R.S.B.C. 1996 c. 50.

(Attached as Appendix "A" is the original Petition.)

Section 150 of the *Election Act* allows for an application to be made to the Supreme Court of British Columbia for a declaration regarding the right of an individual to take office where the validity of an election is challenged. Such an application may be made only by a candidate in the election, the Chief Electoral Officer or a voter for the electoral district for which the election was held. In this particular matter, the application was made on the basis that the election of all of the Members of the Legislative Assembly representing the governing New Democratic Party should be declared invalid because of a violation of section 256 of the *Election Act*.

Section 256 of the *Election Act* bears the heading "Intimidation" and provides, in part:

"Intimidation:

Section 256(2) – An individual or organization must not, by abduction, duress or fraudulent means, do any of the following:

(c) Compel, persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate or for a candidate of a particular political party."

Under section 150(3) of the *Election Act*, the time limit for making an application made on the basis that section 256 of the *Act* was contravened, is three months after the date of the contravention, or thirty days after the return of the Writ for the election, whichever is later.

Section 150(10) of the *Election Act* requires that an application based on a claim that section 256 of the *Act* was contravened must be decided on evidence regarding that claim given orally by witnesses rather than by affidavit.

In the Petition filed August 27, 1996 with the Supreme Court of British Columbia, the original Petitioners sought to have the proceeding certified as a class proceeding and that the Petitioner, Leonard Friesen, be the representative Petitioner. This was, in part, because the named Petitioners, Leonard Friesen, Holly Kuzenko and Mildred Umbarger were individual voters for only three of the electoral districts for which the provincial general election was held. Those electoral districts were: Surrey-Green Timbers, New Westminster, and Rossland-Trail.

The Members of the Legislative Assembly elected for those three electoral districts were Members of the governing New Democratic Party, namely Sue Hammell (Surrey-Green Timbers), Ed Conroy (Rossland-Trail), and Graeme Bowbrick (New Westminster). The original Petition did not name individual voters for any of the other electoral districts for which Members of the Legislative Assembly representing the governing New Democratic Party were elected. The Original Petitioners, therefore, sought to utilize the provisions of the *Class Proceedings Act* to challenge the validity of the elections of the balance of New Democratic Members of the Legislative Assembly on a representative basis, using Mr. Friesen as a representative Petitioner for voters in those other electoral districts.

The original Petition was amended on January 2, 1997. As amended, the Original Petitioners added allegations that the Respondent Members of the Legislative Assembly, personally or through agents, had caused voters at the provincial general election to vote for the candidate of a particular party by fraudulent means, contrary to section 256 of the *Election Act*. Further, it alleged that the Respondent New Democratic Party of British Columbia, and the individual Respondents, Glen Clark and Andrew Petter, had, by fraudulent means, compelled, persuaded or otherwise caused an individual to vote for a candidate of the political party in the provincial general election.

The Amended Petition particularized the misrepresentations alleged to have been made by the Respondents to fraudulently persuade the Petitioners and other members of the electorate to vote for the candidates endorsed by the New Democratic Party as follows:

- (a) that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and, as a result, the budget of the Government for the 1995-96 fiscal year was in surplus;

- (b) that the Government of British Columbia during the terms of office preceding the General Election of May 28, 1996, had been fiscally prudent and, as a result, the budget of the Government for the 1996-97 fiscal year would be in surplus; and,
- (c) as a further consequence of such fiscal prudence, the Government of British Columbia was able to afford a Capital Development Program in an amount of \$250,000,000.00 to improve the Province's infrastructure, including school, transport, and other facilities.

(Attached as Appendix "B" is the Amended Petition.)

Interlocutory Applications and Appeals

Over the three and a half years between the filing of the Petition and the hearing of the application, a number of pre-trial conferences, applications and appeals were conducted on behalf of the various parties.

February 5 and 6, 1997 – Application to have the Petition struck out

The Respondents applied before the Honourable Chief Justice Williams for an order that the Amended Petition be dismissed. The issues raised included:

- (a) that the Petition containing the application was filed outside of the three month time limit under section 150(3) of the *Election Act*;
- (b) that, in any event, the Petition had only been filed on behalf of three voters in three separate electoral districts and that the Petition against the remaining 36 elected Members must be dismissed as out of time;
- (c) that the Petition did not contain sufficient particulars to support allegations of misrepresentation or fraud;
- (d) that the *Class Proceedings Act* could not save the Petition since it was a procedural mechanism and can only apply where a cause of action exists;
- (e) that the claim against the New Democratic Party must be dismissed because the pleadings sought no remedy against the Party and there was no jurisdiction for the court to make any declaration against the Party in the absence of a prosecution of an offence under Part 12 of the *Election Act*;
- (f) that the application required voters to disclose how they had voted which was a contravention of section 90(3) of the *Election Act*;
- (g) that the requirement of section 150(10) of the *Election Act*, requiring that all evidence on an application of this sort must be oral, made it impossible for the Petitioners to succeed if it required voters to disclose how they had voted;

- (h) that any irregularity or contravention did not, in any event, materially affect the results of the election and it would be impossible for the Petitioners to prove otherwise; and,
- (i) that the three named Petitioners may have voted in an advance poll and not the general election, making them even further out of time.

The Honourable Chief Justice dismissed the application, finding that:

- the Court could not say at this stage of the case that the three Petitioners had failed to file their Petition within the three months prescribed by section 150(3);
- the Petitioners did not have standing to make an application in the remaining 36 electoral districts since they were not voters in each of the electoral districts for which those other 36 elections were held;
- on the facts of this case, it could not have been the intention of the Legislature to let one voter start an action in one riding and then months, or even years later, decide to add the other voters or the same voter as their representative for actions in each of the other electoral districts;
- a decision regarding the applicability of the three month limitation period in respect of the other 36 ridings was premature and would have to await the outcomes of the certification motions under the *Class Proceedings Act*;
- while there may be insufficient particulars in the Petition to support the allegations of fraud or misrepresentation, the Respondents have not requested particulars. If, upon request, the Petitioners do fail to provide particulars, then the Respondents could seek a further order from the Court;
- it was premature, without full argument, to determine whether or not the *Election Act* takes precedence over the *Class Proceedings Act* and whether the "individual nature" of this action under the *Election Act* is one capable of class representation;
- it is a matter of evidence as to whether it was appropriate for the Court to grant a declaration in respect of the involvement of the New Democratic Party and the Petition should not be dismissed against the Party at this stage;
- the balance of issues cannot be dealt with at this early stage without the Petitioners having the opportunity of establishing a case;
- in summary, provided the Plaintiff's pleadings are such that they may be able to make out a case, doubts should be resolved in their favour until they have "had their day in Court".

(Attached as Appendix "C" are the Reasons for Judgment of the Honourable Chief Justice dated February 27, 1997 and reported at (1997) 28 B.C.L.R. (3d) p. 354.)

September 29, 30 and October 1, 1997 – Application to have the Petition certified as a class proceeding pursuant to the *Class Proceedings Act*

The Petitioners applied to have the proceeding certified as a class proceeding pursuant to the *Class Proceedings Act*.

The issues before the Court were:

- (a) Does this Court have jurisdiction to hear a class proceeding certification Petition brought under the *Election Act*?
- (b) Can a Petition under the *Election Act* be brought under the *Class Proceedings Act* and, if so, how can ostensible conflicts between the statutes be reconciled?
- (c) If the Court did have jurisdiction to hear this Petition, should the Court certify this action under the *Class Proceedings Act*?

The Honourable Chief Justice dealt with the certification application. He concluded that:

- the Supreme Court of British Columbia did have the jurisdiction to hear the Petition for certification;
- the *Class Proceedings Act* cannot override the constitutionally protected right of the Legislature to adjudicate the outcome of elections or, alternatively, to design and delegate means of adjudicating elections to the Supreme Court;
- there can only be a cause of action under the *Election Act* if a voter in a particular electoral district makes an application within three months after the date of the contravention, or 30 days after the return of the Writ for the election, whichever is later. An application was not made in the remaining 36 ridings and an application is the only way the validity of election in a riding can be challenged. Since no application was made by a voter in those 36 ridings, there is no cause of action to which a certification application could apply;
- the Petitioners failed to establish that the *Class Proceedings Act* was the preferable procedure in this case.

As a consequence, the application for certification was dismissed.

In the same application, the three remaining Respondents, Sue Hammell, Graeme Bowbrick and Ed Conroy, brought a fresh motion requesting that the Court strike out the Petition as it disclosed no cause of action. This application was dismissed and the Court also concluded that the New Democratic Party must remain as a Respondent in the case. However, the Court deferred a decision on dismissal of the Petition against other Respondents to a later application.

(Attached as Appendix "D", Reasons for Judgment of the Honourable Chief Justice dated November 4, 1997 and reported at (1998) 47 B.C.L.R. (3d) p. 308.)

December 3, 1997 – Respondents' further application to have the Petition dismissed against all Respondents save and except Sue Hammell, Graeme Bowbrick and Ed Conroy

After hearing argument by counsel for the parties on December 3, 1997, the Court reserved judgment until December 18, 1997. At that time, the Honourable Chief Justice concluded that the Court did not have jurisdiction to grant any remedy in the subject proceeding beyond granting a remedy against an elected Member of the Legislative Assembly sought by a voter in that electoral district. It would be quite inappropriate for the Court to exercise its jurisdiction to allow a declaratory action against the New Democratic Party, or Messrs. Clark or Petter in these circumstances. Otherwise, as the parties had agreed that the Petition should not proceed against the remaining Respondents, other than the New Democratic Party or Messrs Clark or Petter, the Petition was dismissed against all Respondents save and except Ms. Hammell, Mr. Bowbrick and Mr. Conroy.

(Attached as Appendix "E" are the Reasons for Judgment of the Honourable Chief Justice dated December 18, 1997 and reported at (1998) 45 B.C.L.R. (3d) p. 319.)

April 21, 1998 – Granting of Leave to Appeal to the British Columbia Court of Appeal

On April 21, 1998, the Respondents, Hammell, Bowbrick and Conroy, were granted leave to appeal the Order of the Honourable Chief Justice that dismissed their application to have the Petition against them struck out. The Court of Appeal stayed the Order of the Honourable Chief Justice pending appeal.

At the same time, the Petitioners, Friesen, Kuzenko and Umbarger, appealed from the Order of the Honourable Chief Justice that dismissed their Petition against the Respondents, Glen Clark, Andrew Petter, and the New Democratic Party.

On June 23, 1998, Mr. Justice Donald of the British Columbia Court of Appeal ordered that the two appeals be heard at the same time.

December 1 and 2, 1998 – The Appeals to the British Columbia Court of Appeal

Argument on the Appeals was heard by a Panel of the British Columbia Court of Appeal on December 1st and 2nd, 1998. That Panel consisted of the Honourable Mr. Justice Cumming, the Honourable Mr. Justice Braidwood and the Honourable Madam Justice Prowse, in Vancouver, British Columbia.

The Court of Appeal handed down its judgment on January 20, 1999. The head note of the reported Decision found in the British Columbia Law Reports (1999) 57 B.C.L.R. (3d) p. 276, summarizes the Court's decision as follows:

"The words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament. The primary object of provisions such as section 256 of the *Election Act* is to maintain and enhance the

integrity of the electoral process. In enacting section 256, the Legislature intended to safeguard the public from fraudulent conduct on the part of, or on behalf of, the candidate or a political party, which was of sufficient import that it influenced the judgment of potential voters by causing them to vote other than they would have but for the fraudulent conduct. Electoral candidates and political parties must not fraudulently mislead the public with respect to material issues which could reasonably be expected to affect their decision for whom to vote.

The type of misrepresentations which would fall under "fraudulent means" within the meaning of section 256(2)(c) would be misrepresentations of material fact which were intended to, and did, lead voters to vote for a candidate or party for whom the voter would not otherwise have voted, and which were made by a candidate or political party, knowing that they were false, or without regard to their truth or falsity. Statements of intention or belief would not constitute fraudulent means within the meaning of section 256. The Trial Judge's conclusion that the Petition against the Members of the Legislative Assembly should proceed to trial was correct.

Freedom of speech is not diminished by an interpretation of section 256 which penalizes fraudulent misrepresentations concerning material facts which go to the heart of the voter's decision for whom to vote.

There is no provision in the *Act* for granting declaratory relief of the kind sought by the Petitioners. The *Act* is a code and a court, therefore, does not have any residual inherent jurisdiction to grant declaratory relief beyond that set out in the *Act*. The Appeal of the Petitioners was dismissed on the basis that the Court has no jurisdiction to grant the declaratory relief claimed by them."

(Attached as Appendix "F" are the Reasons for Judgment of the British Columbia Court of Appeal dated January 20, 1998 and reported at (1999) 57 B.C.L.R. (3d) 276.)

January 27, 2000 – Respondents Seek Leave to Appeal to the Supreme Court of Canada

The Respondents' application seeking leave to appeal to the Supreme Court of Canada from the decision of the British Columbia Court of Appeal was denied, without reasons.

The Hearing of the Petition

The hearing of the Petition took place in the Supreme Court of British Columbia at Vancouver, British Columbia on April 10-13, 17-20, 25-28, May 30, June 26-30 and July 4 and 5, 2000.

During the course of the application, only the Petitioners called evidence. A total of 11 witnesses took the stand. They were:

1. Leonard Friesen (Petitioner)
2. Mildred Umbarger (Petitioner)
3. Holly Kuzenko (Petitioner)
4. Brenda Eaton (Secretary of the Treasury Board)
5. Lois McNabb (Director of the Economic and Fiscal Forecasting Branch of the Ministry of Finance and Corporate Relations)
6. Douglas Foster (Manager of the Fiscal Forecasting and Analysis Unit of the Ministry of Finance and Corporate Relations)
7. Christopher Lawless (Manager of the Economic Forecasting and Analysis Unit of the Ministry of Finance and Corporate Relations)
8. Elizabeth Cull (former Minister of Finance and Corporate Relations)
9. Glen Clark (former Premier of British Columbia)
10. Julie Winram (partner with MarkTrend Research)
11. Dr. James Bruton (expert in the conduct of political polls). Dr. Bruton was called by Mr. Aikenhead, counsel for the Respondents Hammell and Bowbrick, as an expert witness on opinion polling to rebut the evidence of Ms. Winram and to oppose the admissibility of her evidence. He was not called to give independent evidence on behalf of the Respondents as part of their case.

Numerous applications were made by counsel for all parties, both at the commencement of the hearing, and throughout its progress. Many of the applications dealt with matters of procedure. Some of those applications were peculiar to this particular case; others will be material to the hearing of any future application made pursuant to section 150 of the *Election Act*.

Most importantly, the Court determined that it did not sit as a Court of Inherent Jurisdiction. Instead, it was constituted as an Election Court. As such, it was a Court of Inferior Jurisdiction, which was required to adhere to the provisions of the *Election Act* in overseeing the hearing of the application.

As a consequence, the Rules of Court that apply to proceedings in the Supreme Court of British Columbia did not apply to this case. Nevertheless, the Court retained a jurisdiction to control its own process for practical purposes. In particular, the Court found that a power to compel witnesses was necessary to properly determine the matter. The Court issued various subpoenas upon the application of counsel but did

not recognize a power for counsel themselves to subpoena witnesses without direction of the Court.

Other fundamental issues such as which party bore the onus of proof, and which standard of proof to apply, were the matter of argument and required the determination of the Court.

At the conclusion of the trial, the Chief Electoral Officer invited the Court to set out her views on the procedural shortcomings of such an application under section 150 of the *Election Act* but the Court declined, saying that it was a matter best left to the Legislature.

The hearing of the application under section 150 of the *Election Act* was both complicated and lengthened by the absence of clear procedural guidelines. The provisions of the former *Election Act* that provided for the process of similar applications were both specific and detailed. The present form of section 150 does not contain any procedural directions. In the result, Madam Justice Humphries determined that, in the absence of specific direction, the *Supreme Court Rules* did not apply to this application.

Instead, she was forced to craft procedural responses on the premise that, as Judge sitting as a Court of interior jurisdiction, she had a responsibility to control the process which she was overseeing.

The Chief Electoral Officer urges the government to consider legislative amendments which would specifically provide that the provisions of the *Supreme Court Rules* apply to applications under section 150 of the *Election Act*. There is sufficient flexibility under the *Supreme Court Rules* to allow the application to be dealt with on either a summary basis, or through the procedural mechanisms more appropriate to an action proceeding to trial. This amendment need not be detailed and could simply indicate that the *Supreme Court Rules* apply to hearings under section 150 except where the Rules are inconsistent with any provision of section 150.

At the conclusion of the Petitioner's case, counsel for the three Respondents declined to call evidence. Instead, they challenged the Petitioner's case on the basis of the Petitioner's evidence alone supported by arguments of law.

Reasons for Judgment at Trial

After the conclusion of evidence and argument on July 5, 2000, the Honourable Madam Justice Humphries reserved judgment. On August 3, 2000, she delivered her Reasons for Judgment in which she dismissed the Petition.

In her Reasons, the Court found:

- That the standard of proof to successfully establish a breach of section 256 of the *Election Act* was proof "beyond a reasonable doubt"
- However, that she would have reached the same conclusion, had the lesser standard of "balance of probabilities" been applied
- That there was a representation made by Mr. Clark during the election campaign that the 1995-96 and 1996-97 budgets were balanced or in surplus, and that statement was sufficient to allow her to consider the pertinent issues in the case
- That she would proceed on the basis that each Petitioner had heard Mr. Clark say, during the election campaign, that the NDP had balanced the budget and expected the upcoming budget to be balanced. Each Petitioner testified that they voted for the NDP candidate in their riding on the strength of that, and would not have voted for them otherwise
- The responsibility for the revised forecast for Budget '95 rested with Ms. Cull and it was clear from her testimony that she accepted the entire responsibility for both budgets. Despite the alleged misrepresentations not having been made by Ms. Cull, she was the source of Mr. Clark's information. Therefore, an examination of her evidence was necessary. The question to be posed was "Did Ms. Cull, on her own initiative, contrive a revised forecast for Budget '95 in order to trick the voters of British Columbia, by fraudulent means, into voting for the NDP?"
- The uncontradicted, and unchallenged, evidence of Ms. Cull was that the B.C. economy is very difficult to predict, particularly those aspects based on commodities such as forestry which are very volatile at year end
- There was no evidence that Ms. Cull instructed anyone on her staff to manipulate or juggle figures
- Ms. Cull was an honest, careful, articulate and well informed witness. The Court accepted that Ms. Cull believed that her assumptions were reasonable and that she was honest in her belief that the 1995-96 Budget was balanced. She was ultimately wrong, but she was not fraudulent
- That as Ms. Cull's beliefs were honest and reasonable, the Court determined that, on the evidence before her, Mr. Clark had no other source of information available to him and accepted Ms. Cull's statements. He then made the public statement that the 1995-96 Budget was balanced. The statement was not known to be false, nor was it made without regard to its truth or falsity. In all of these circumstances, the Court was unable to find that the representations that the Budget for 1995-96 was balanced constitutes "fraudulent means" within the meaning of section 256 of the *Election Act*
- If the voters in British Columbia accept the general characterization of the situation advanced by the Petitioners, that is a matter they can consider when they next come to vote, but the circumstances here do not give rise to a legal remedy

- In dealing with the 1996-97 Budget, the Court could draw no conclusions adverse to the credibility of Ms. Cull or Mr. Clark, nor could she find any evidence to support the proposition that Ms. Cull was forced by Mr. Clark to accept figures which she knew were unreasonable and unattainable
- If the Petitioners could actually prove that there was a conspiracy between Mr. Clark and/or his advisors and/or Ms. Cull, to insert grossly exaggerated numbers into the 1996-97 Budget, which they knew could never materialize, the Petitioners might overcome the hurdle placed in their way by the Court of Appeal - that is, that statements of intention or belief cannot constitute "fraudulent means"
- In order to come to the conclusion that Ms. Cull was forced by Mr. Clark to put forward a fraudulent Budget, the Court would have to ignore the evidence, assume both Mr. Clark and Ms. Cull lied throughout the entire process and reject everything they said on principle. Then, without any evidence to support the Petitioners' theory, the Court would nevertheless have to make the findings of fact they wish her to make based on the simple proposition that if Mr. Clark or Ms. Cull testified to something, the opposite must be true. This would not be an appropriate exercise of the Court's function
- The Court was unable to conclude, based on the evidence, that there was any such conspiracy and that Ms. Cull's beliefs in the projections contained in Budget '96 were anything other than her best judgment in the circumstances. The decisions were hers alone to make; the assumptions she used and projections she reached were available to the public. The existence of the contingency plan, on the evidence before the Court, showed caution rather than deceit. As with Budget '95, the fact that Ms. Cull's forecast was ultimately shown to be wrong does not make her statements fraudulent
- As well, as there is no evidence to support the theory of a conspiracy, the Petitioners are met with the valid argument that statements made about this Budget in May of 1996 could only be statements of intention and belief. They cannot be "fraudulent means". Even Ms. Umbarger seemed prepared to concede during cross-examination that she could accept there might be an explanation for discrepancies in a budget for a year that had not yet occurred
- The Petitioners had conceded throughout the hearing that the individual Respondents, Hammell, Bowbrick and Conroy, did not personally contravene section 256 of the *Election Act*. In her conclusion, the Trial Judge noted that concession. The Court also concluded that there was no breach of section 256 by Ms. Cull or Mr. Clark on behalf of the NDP. The Court dismissed the Petition on that basis
- She added that, in view of the conclusion she had reached, there was no need to consider the interesting arguments advanced under section 151 of the *Election Act* as to whether a breach of section 256 materially affected the election and who would bear the onus of establishing a material effect on the election

- With regard to court costs, the Court invited counsel to address that issue with her by arrangements through the Registry if it became an issue. To date, no form of Order has been entered and no arrangements have been made to make submissions regarding the question of costs.

(Attached as Appendix "G" are - Trial Judge's Unreported Reasons for Judgment dated August 3, 2000.)

Status of Appeal

The appeal period for the Petitioners to appeal the Trial Judge's Decision to the Court of Appeal expired on September 2, 2000, without the filing of a Notice of Appeal. As a result, the Judgment of Madam Justice Humphries constitutes the final determination of the Petitioner's Application.

SU
OF

A962818

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA



LEONARD FRIESEN, HOLLY KUZENKO, MILDRED UMBARGEN, and THE MEMBERS OF THE CLASS OF PERSONS CAUSED TO VOTE FOR THE CANDIDATE OF A PARTICULAR POLITICAL PARTY IN THE GENERAL PROVINCIAL ELECTION HELD THE 28TH DAY OF MAY, 1996 AS A RESULT OF A VIOLATION OF SECTION 256 OF THE ELECTION ACT OF BRITISH COLUMBIA

PETITIONERS

SUE HAMMELL, LOIS BOONE, GRAEME BOWBRICK, GRETCHEN BREWIN, PIETRO CALENDINO, JOHN CASHORE, GLEN CLARK, ED CONROY, UJJAL DOSANJH, JIM DOYLE, CORKY EVANS, MIKE FARNWORTH, HELMUT GIESBRECHT, EVELYN GILLESPIE, BILL GOODACRE, BILL HARTLEY, GERARD JANSSEN, RICK KASPER, JENNY WAI CHING KWAN, HARRY LALI, DALE LOVICK, JOY MACPHAIL, CATHY MCGREGOR, DAN MILLER, STEVE ORCHERTON, ANDREW PETTER, PENNY PRIDDY, JAN PULLINGER, PAUL RAMSEY, FRED RANDALL, GLENN ROBERTSON, JOAN SAWICKI, MOE SIHOTA, JOAN SMALLWOOD, TIM STEVENSON, DENNIS STREIFEL, IAN WADDELL, ERDA WALSH, DAVID ZIRNHELT, and THE NEW DEMOCRATIC PARTY OF BRITISH COLUMBIA

RESPONDENTS

Brought under the *Class Proceedings Act*

PETITION TO THE COURT

THIS IS THE PETITION OF:

LEONARD FRIESEN, Small Business Operator, 8922 141 A Street, Surrey, British Columbia;

HOLLY KUZENKO of 110 - 215 - 10th Street, New Westminster, British Columbia.

MILDRED UMBARGEN of Site 6, Comp. 22, SS #1, Trail, British Columbia.

ON NOTICE TO:

ROBERT A. PATTERSON, Chief Electoral Officer, 1075 Pendergast Street, Victoria, British Columbia

DISTRICT ELECTORAL OFFICER, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Surrey-Green Timbers, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Prince George-Mount Robson, 1075 Pendergast Street, Victoria, British Columbia.

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DISTRICT ELECTORAL OFFICER of Comox Valley, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Bulkley Valley-Stikine, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Maple Ridge-Pitt Meadows, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Alberni, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Malahat-Juan de Fuca, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Mount Pleasant, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Yale-Lillooet, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Nanaimo, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Hastings, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Kamloops, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of North Coast, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Victoria-Hillside, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Saanich South, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Surrey-Newton, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Cowichan-Ladysmith, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Prince George North, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Burnaby-Edmonds, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of North Island, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Burnaby Willingdon, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Esquimalt-Metchosin, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Surrey-Whalley, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Burrard, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Mission-Kent, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Fraserview, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Kootenay, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Cariboo South, 1075 Pendergast Street, Victoria, British Columbia.

SUE HAMMELL, Member of the Legislative Assembly for the electoral district of Surrey-Green Timbers, Parliament Buildings, Victoria, British Columbia.

LOIS BOONE, Member of the Legislative Assembly for the electoral district of Prince George-Mount Robson, Parliament Buildings, Victoria, British Columbia.

GRAEME BOWBRICK, Member of the Legislative Assembly for the electoral district of New Westminster, Parliament Buildings, Victoria, British Columbia.

GRETCHEN BREWIN, Member of the Legislative Assembly for the electoral district of Victoria-Beacon Hill, Parliament Buildings, Victoria, British Columbia.

PIETRO CALENDINO, Member of the Legislative Assembly for the electoral district of Burnaby North, Parliament Buildings, Victoria, British Columbia.

JOHN CASHORE, Member of the Legislative Assembly for the electoral district of Coquitlam, Maillardville, Parliament Buildings, Victoria, British Columbia.

GLEN CLARK, Member of the Legislative Assembly for the electoral district of Vancouver-Kingsway, Parliament Buildings, Victoria, British Columbia.

ED CONROY, Member of the Legislative Assembly for the electoral district of Rossland-Trail, Parliament Buildings, Victoria, British Columbia.

UJJAL DOSANJH, Member of the Legislative Assembly for the electoral district of Vancouver-Kensington, Parliament Buildings, Victoria, British Columbia.

JIM DOYLE, Member of the Legislative Assembly for the electoral district of Columbia River-Revelstoke, Parliament Buildings, Victoria, British Columbia.

CORKY EVANS, Member of the Legislative Assembly for the electoral district of Nelson-Creston, Parliament Buildings, Victoria, British Columbia.

MIKE FARNWORTH, Member of the Legislative Assembly for the electoral district of Port Coquitlam, Parliament Buildings, Victoria, British Columbia.

HELMUT GIESBRECHT, Member of the Legislative Assembly for the electoral district of Skeena, Parliament Buildings, Victoria, British Columbia.

EVELYN GILLESPIE, Member of the Legislative Assembly for the electoral district of Comox Valley, Parliament Buildings, Victoria, British Columbia.

BILL GOODACRE, Member of the Legislative Assembly for the electoral district of Bulkley Valley-Stikine, Parliament Buildings, Victoria, British Columbia.

BILL HARTLEY, Member of the Legislative Assembly for the electoral district of Maple Ridge-Pitt Meadows, Parliament Buildings, Victoria, British Columbia.

GERARD JANSSEN, Member of the Legislative Assembly for the electoral district of Alberni, Parliament Buildings, Victoria, British Columbia.

RICK KASPER, Member of the Legislative Assembly for the electoral district of Malahat-Juan de Fuca, Parliament Buildings, Victoria, British Columbia.

JENNY WAI CHING KWAN, Member of the Legislative Assembly for the electoral district of Vancouver, Mount Pleasant, Parliament Buildings, Victoria, British Columbia.

HARRY LALI, Member of the Legislative Assembly for the electoral district of Yale-Lillooet, Parliament Buildings, Victoria, British Columbia.

DALE LOVICK, Member of the Legislative Assembly for the electoral district of Nanaimo, Parliament Buildings, Victoria, British Columbia.

JOY MACPHAIL, Member of the Legislative Assembly for the electoral district of Vancouver-Hastings, Parliament Buildings, Victoria, British Columbia.

CATHY MCGREGOR, Member of the Legislative Assembly for the electoral district of Kamloops, Parliament Buildings, Victoria, British Columbia.

DAN MILLER, Member of the Legislative Assembly for the electoral district of North Coast, Parliament Buildings, Victoria, British Columbia.

STEVE ORCHERTON, Member of the Legislative Assembly for the electoral district of Victoria-Hillside, Parliament Buildings, Victoria, British Columbia.

ANDREW PETTER, Member of the Legislative Assembly for the electoral district of Saanich South, Parliament Buildings, Victoria, British Columbia.

PENNY PRIDDY, Member of the Legislative Assembly for the electoral district of Surrey-Newton, Parliament Buildings, Victoria, British Columbia.

JAN PULLINGER, Member of the Legislative Assembly for the electoral district of Cowichan-Ladysmith, Parliament Buildings, Victoria, British Columbia.

PAUL RAMSEY, Member of the Legislative Assembly for the electoral district of Prince George North, Parliament Buildings, Victoria, British Columbia.

FRED RANDALL, Member of the Legislative Assembly for the electoral district of Burnaby-Edmonds, Parliament Buildings, Victoria, British Columbia.

GLENN ROBERTSON, Member of the Legislative Assembly for the electoral district of North Island, Parliament Buildings, Victoria, British Columbia.

JOAN SAWICKI, Member of the Legislative Assembly for the electoral district of Burnaby Willingdon, Parliament Buildings, Victoria, British Columbia.

MOE SIHOTA, Member of the Legislative Assembly for the electoral district of Esquimalt-Metchosin, Parliament Buildings, Victoria, British Columbia.

JOAN SMALLWOOD, Member of the Legislative Assembly for the electoral district of Surrey-Whalley, Parliament Buildings, Victoria, British Columbia.

TIM STEVENSON, Member of the Legislative Assembly for the electoral district of Vancouver-Burrard, Parliament Buildings, Victoria, British Columbia.

DENNIS STREIFEL, Member of the Legislative Assembly for the electoral district of Mission-Kent, Parliament Buildings, Victoria, British Columbia.

IAN WADDELL, Member of the Legislative Assembly for the electoral district of Vancouver-Fraserview, Parliament Buildings, Victoria, British Columbia.

ERDA WALSH, Member of the Legislative Assembly for the electoral district of Kootenay, Parliament Buildings, Victoria, British Columbia.

DAVID ZIRNHELT, Member of the Legislative Assembly for the electoral district of Cariboo South, Parliament Buildings, Victoria, British Columbia.

THE NEW DEMOCRATIC PARTY OF BRITISH COLUMBIA, 3110 Boundary Road, Burnaby, British Columbia.

Let all persons whose interests may be affected by the order sought TAKE NOTICE that the Petitioner applies to court for the relief set out in this Petition.

IF YOU WISH TO BE HEARD at the hearing of the Petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the Petitioner address for delivery, which is set out in this Petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the Petitioner may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

The address of the registry is:

The Law Courts
800 Smithe Street
Vancouver, B.C. V6Z 2E1

The address for delivery is:

In care of DEVLIN JENSEN
Barristers & Solicitors
2550 - 555 West Hastings Street
Vancouver, B.C. V6B 4N5.
Attn: Peter Jensen, Esq.

The name and office address of
the Petitioners' solicitor is:

DEVLIN JENSEN
Barristers & Solicitors
2550 - 555 West Hastings Street
Vancouver, B.C. V6B 4N5.
Attn: Peter Jensen, Esq.

The Petitioner applies to this Court for Order that:

- a. This proceeding be certified as a class proceeding and the Petitioner, Leonard Friesen, be the representative Petitioner.
- b. The election of New Democratic Party candidate, Sue Hammell, in the electoral district of Surrey- Green Timbers in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- c. The election of New Democratic Party candidate, Lois Boone, in the electoral district of Prince George-Mount Robson in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- d. The election of New Democratic Party candidate, Graeme Bowbrick, in the electoral district of New Westminster in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- e. The election of New Democratic Party candidate, Gretchen Brewin, in the electoral district of Victoria-Beacon Hill in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- f. The election of New Democratic Party candidate, Pietro Calendino, in the electoral district of Burnaby North in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- g. The election of New Democratic Party candidate, John Cashore, in the electoral district of Coquitlam-Maillardville in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- h. The election of New Democratic Party candidate, Glen Clark, in the electoral district of Vancouver-Kingsway in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- i. The election of New Democratic Party candidate, Ed Conroy, in the electoral district of Rossland-Trail in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- j. The election of New Democratic Party candidate, Ujjal Dosanjh, in the electoral district of Vancouver-Kensington in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- k. The election of New Democratic Party candidate, Jim Doyle, in the electoral district of Columbia River-Revelstoke in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- l. The election of New Democratic Party candidate, Corky Evans, in the electoral district of Nelson-Creston in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- m. The election of New Democratic Party candidate, Mike Farnworth, in the electoral district of Port Coquitlam in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- n. The election of New Democratic Party candidate, Helmut Giesbrecht, in the electoral district of Skeena in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section

256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- o. The election of New Democratic Party candidate, Evelyn Gillespie, in the electoral district of Comox Valley in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- p. The election of New Democratic Party candidate, Bill Goodacre, in the electoral district of Bulkley Valley-Stikine in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- q. The election of New Democratic Party candidate, Bill Hartley, in the electoral district of Maple Ridge-Pitt Meadows in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- r. The election of New Democratic Party candidate, Gerard Janssen, in the electoral district of Alberni in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- s. The election of New Democratic Party candidate, Rick Kasper, in the electoral district of Malahat-Juan de Fuca in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- t. The election of New Democratic Party candidate, Jenny Wai Ching Kwan, in the electoral district of Vancouver-Mount Pleasant in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- u. The election of New Democratic Party candidate, Harry Lali, in the electoral district of Yale-Lillooet in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- v. The election of New Democratic Party candidate, Dale Lovick, in the electoral district of Nanaimo in the general provincial election of May 28, 1996, be declared invalid and that

the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- w. The election of New Democratic Party candidate, Joy MacPhail, in the electoral district of Vancouver-Hastings in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- x. The election of New Democratic Party candidate, Cathy McGregor, in the electoral district of Kamloops in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- y. The election of New Democratic Party candidate, Dan Miller, in the electoral district of North Coast in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- z. The election of New Democratic Party candidate, Steve Orcherton, in the electoral district of Victoria-Hillside in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- aa. The election of New Democratic Party candidate, Andrew Petter, in the electoral district of Saanich South in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- bb. The election of New Democratic Party candidate, Penny Priddy, in the electoral district of Surrey-Newton in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- cc. The election of New Democratic Party candidate, Jan Pullinger, in the electoral district of Cowichan-Ladysmith in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- dd. The election of New Democratic Party candidate, Paul Ramsey, in the electoral district of Prince George North in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ee. The election of New Democratic Party candidate, Fred Randall, in the electoral district of Burnaby-Edmonds in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ff. The election of New Democratic Party candidate, Glenn Robertson, in the electoral district of North Island in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- gg. The election of New Democratic Party candidate, Joan Sawicki, in the electoral district of Burnaby Willingdon in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- hh. The election of New Democratic Party candidate, Moe Sihota, in the electoral district of Esquimalt-Metchosin in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ii. The election of New Democratic Party candidate, Joan Smallwood, in the electoral district of Surrey-Whalley in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- jj. The election of New Democratic Party candidate, Tim Stevenson, in the electoral district of Vancouver-Burrard in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- kk. The election of New Democratic Party candidate, Dennis Streifel, in the electoral district of Mission-Kent in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section

256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- ll. The election of New Democratic Party candidate, Ian Waddell, in the electoral district of Vancouver-Fraserview in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- mm. The election of New Democratic Party candidate, Erda Walsh, in the electoral district of Kootenay in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- nn. The election of New Democratic Party candidate, David Zirnhelt, in the electoral district of Cariboo South in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Defendants' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

This petition is supported by the affidavit of Douglas V. Bjorkman sworn the 27th day of August, 1996 as to the facts on which the application is based.

At the hearing of this Petition will be led the oral evidence of the Petitioner, Leonard Friesen, and other members of the class represented by him verifying the facts of the Petition herein pursuant to Section 150 of the Election Act.

The facts upon which this Petition is based are as follows:

- 1. The Petitioner, Leonard Friesen ("Friesen"), resides in the electoral district of Surrey-Green Timbers, British Columbia.
- 2. The Petitioner, Holly Kuzenko ("Kuzenko"), resides in the electoral district of New Westminster, British Columbia.
- 3. The Petitioner, Mildred Umbargen ("Umbargen"), resides in the electoral district of Rossland-Trail, British Columbia.
- 4. The Petitioners, Friesen, Kuzenko and Umbargen, are representative of the class of persons who were induced to vote for the candidates in the general provincial election held on May 28, 1996 endorsed by the New Democratic Party of British Columbia as a result of the misrepresentations of the Respondents their servants and agents as hereinafter particularized (the "Class").

5. The Respondent, Sue Hammell ("Hammell"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Green Timbers in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
6. The Respondent, Lois Boone ("Boone"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Prince George-Mount Robson in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
7. The Respondent, Graeme Bowbrick ("Bowbrick"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of New Westminster in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
8. The Respondent, Gretchen Brewin ("Brewin"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Victoria-Beacon Hill, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
9. The Respondent, Pietro Calendino ("Calendino"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Burnaby North, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
10. The Respondent, John Cashore ("Cashore"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Coquitlam-Maillardville, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
11. The Respondent, Glen Clark ("Clark"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Kingsway, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
12. The Respondent, Ed Conroy ("Conroy"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Rossland-Trail, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
13. The Respondent, Ujjal Dosanjh ("Dosanjh"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Kensington, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
14. The Respondent, Jim Doyle ("Doyle"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Columbia river-

Revelstoke, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

15. The Respondent, Corky Evans ("Evans"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Nelson-Creston, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
16. The Respondent, Mike Farnworth ("Farnworth"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Port Coquitlam, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
17. The Respondent, Helmut Giesbrecht ("Giesbrecht"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Skeena, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
18. The Respondent, Evelyn Gillespie ("Gillespie"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Comox Valley, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
19. The Respondent, Bill Goodacre ("Goodacre"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Bulkley Valley-Stikine, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
20. The Respondent, Bill Hartley ("Hartley"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Maple Ridge-Pitt Meadows, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
21. The Respondent, Gerard Janssen ("Janssen"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Alberni, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
22. The Respondent, Rick Kasper ("Kasper"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Malahat-Juan de Fuca, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
23. The Respondent, Jenny Wai Ching Kwan ("Kwan"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Mount Pleasant, in the general provincial election held on May 28, 1996 and

was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

24. The Respondent, Harry Lali ("Lali"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Yale-Lillooet, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
25. The Respondent, Dale Lovick "Lovick", was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Nanaimo, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
26. The Respondent, Joy MacPhail ("MacPhail"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Hastings, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
27. The Respondent, Cathy McGregor ("McGregor"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Kamloops, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
28. The Respondent, Dan Miller ("Miller"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of North Coast, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
29. The Respondent, Steve Orcherton ("Orcherton"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Victoria-Hillside, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
30. The Respondent, Andrew Petter ("Petter"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Saanich South, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
31. The Respondent, Penny Priddy ("Priddy"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Newton, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
32. The Respondent, Jan Pullinger ("Pullinger"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Cowichan-Ladysmith, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

33. The Respondent, Paul Ramsey ("Ramsey"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Prince George North, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
34. The Respondent, Fred Randall ("Randall"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Burnaby-Edmonds, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
35. The Respondent, Glenn Robertson ("Robertson"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of North Island, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
36. The Respondent, Joan Sawicki ("Sawicki"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Burnaby Willingdon, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
37. The Respondent, Moe Sihota ("Sihota"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Esquimalt-Metchosin, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
38. The Respondent, Joan Smallwood ("Smallwood"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Whalley, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
39. The Respondent, Tim Stevenson ("Stevenson"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Burrard, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
40. The Respondent, Dennis Streifel ("Streifel"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Mission-Kent, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
41. The Respondent, Ian Waddell ("Waddell"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Fraserview, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
42. The Respondent, Erda Walsh ("Walsh"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Kootenay, in the

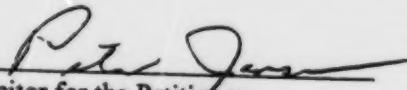
general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

43. The Respondent, David Zirnelt ("Zirnelt"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Cariboo South, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
44. The Respondent New Democratic Party of British Columbia ("N.D.P.") is registered political party pursuant to the Elections Act of the Province of British Columbia.
45. The Respondent, Clark, is the leader of the Respondent, New Democratic Party of British Columbia.
46. During the election campaign preceding the election on May 28, 1996 up to and including the election day the N.D.P. through its leader Clark, its agents and its endorsed candidates and the agents of the endorsed candidates, by diverse methods and on diverse occasions misrepresented a number of material facts in order to induce potential voters, including the Petitioners, to vote for the Respondent, Hammell, as well as other candidates endorsed by the Respondent, New Democratic Party.
47. In particular the misrepresentations made by the Respondents to fraudulently persuade the Petitioners and other members of the electorate to vote for the Respondent, Hammell, and other candidates endorsed by the Respondent, New Democratic Party, include the following:
 - a. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1995-96 fiscal year was in surplus, and
 - b. that as a further consequence of such fiscal prudence the Government of British Columbia was able to afford a capital development program in an amount of \$250,000,000 to improve the Province's infrastructure, including schools, transport, and other facilities.
48. The statements particularized in the preceding paragraph were false and known to be false at the time they were made. After the general provincial election of May 28, 1996, the Respondent, Petter, in his then capacity of Minister of Finance, stated that the Province of British Columbia had a deficit of 235 million dollars for the 1995-96 fiscal year and would be canceling the capital development program in order to prevent a more severe fiscal deficit and to protect the Province's fiscal standing.
49. The nature of the information contained in the misrepresentations is of such a kind that the N.D.P. and the candidates endorsed by it knew that some or all of the misrepresentations were false and further, the said parties disseminated such false information for the purpose of inducing the members of the electorate to vote for the candidates endorsed by the N.D.P., knowing that such misrepresentations were central to the concerns of the

members of the Class. Such a scheme constitutes inducing or causing an individual to vote, by fraudulent means within the meaning of section 256 (2) of the Election Act, to elect the candidates endorsed by the N.D.P., including the Respondent, Hammell.

50. In the alternative to paragraph 48 above, if the N.D.P., and its endorsed candidates, did not actually know whether the misrepresentations were true or false, then they were willfully blind to or indifferent to the truth of the misrepresentations as alleged and the statements were merely manufactured without belief in or concern for the truth of the misrepresentations, for the purpose of inducing members of the Class to vote for the candidates endorsed by the N.D.P., including Hammell.
51. The Petitioners, Friesen, Kuzenko, Umbargen, and the members of the Class were caused and induced to vote for the Respondent, Hammell, and the candidates endorsed by the N.D.P. by the aforesaid fraudulent misrepresentations and had they known the truth they would not have voted for the said candidates.

DATED at the City of Vancouver, in the Province of British Columbia, this 27th day of August, 1996.


Solicitor for the Petitioners

Appendix B



Amended Pursuant to Rule 24(1)(a) of the Rules of Court.

No. A 962818
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

LEONARD FRIESEN, HOLLY KUZENKO, MILDRED UMBARGEN,
and THE MEMBERS OF THE CLASS OF PERSONS CAUSED TO
VOTE FOR THE CANDIDATE OF A PARTICULAR POLITICAL
PARTY IN THE GENERAL PROVINCIAL ELECTION HELD THE
28TH DAY OF MAY, 1996 AS A RESULT OF A VIOLATION OF
SECTION 256 OF THE ELECTION ACT OF BRITISH COLUMBIA

PETITIONERS

AND:

SUE HAMMELL, LOIS BOONE, GRAEME BOWBRICK,
GRETCHEN BREWIN, PIETRO CALENDINO, JOHN CASHORE,
GLEN CLARK, ED CONROY, UJJAL DOSANJH, JIM DOYLE,
CORKY EVANS, MIKE FARNWORTH, HELMUT GIESBRECHT,
EVELYN GILLESPIE, BILL GOODACRE, BILL HARTLEY,
GERARD JANSSEN, RICK KASPER, JENNY WAI CHING KWAN,
HARRY LALI, DALE LOVICK, JOY MACPHAIL, CATHY
MCGREGOR, DAN MILLER, STEVE ORCHERTON, ANDREW
PETTER, PENNY PRIDDY, JAN PULLINGER, PAUL RAMSEY,
FRED RANDALL, GLENN ROBERTSON, JOAN SAWICKI, MOE
SIHOTA, JOAN SMALLWOOD, TIM STEVENSON, DENNIS
STREIFEL, IAN WADDELL, ERDA WALSH, DAVID ZIRNHELT,
and THE NEW DEMOCRATIC PARTY OF BRITISH COLUMBIA

RESPONDENTS

Brought under the Class Proceedings Act

AMENDED PETITION TO THE COURT

Original Filed: August 27, 1996

THIS IS THE PETITION OF:

LEONARD FRIESEN, Small Business Operator, 8922 141 A Street, Surrey, British
Columbia;

HOLLY KUZENKO of 110 - 215 - 10th Street, New Westminster, British Columbia.

MILDRED UMBARGEN of Site 6, Comp. 22, SS #1, Trail, British Columbia.

ON NOTICE TO:

ROBERT A. PATTERSON, Chief Electoral Officer, 1075 Pendergast Street, Victoria, British Columbia

DISTRICT ELECTORAL OFFICER, 1075 Pendergast Street, Victoria, British Columbia

DISTRICT ELECTORAL OFFICER of Surrey-Green Timbers, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Prince George-Mount Robson, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of New Westminster, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Victoria-Beacon Hill, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Burnaby North, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Coquitlam-Maillardville, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Kingsway, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Rossland-Trial, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Kensington, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Columbia River-Revelstoke, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Nelson-Creston, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Port Coquitlam, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Skeena, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Comox Valley, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Bulkley Valley-Stikine, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Maple Ridge-Pitt Meadows, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Alberni, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Malahat-Juan de Fuca, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Mount Pleasant, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Yale-Lillooet, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Nanaimo, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Hastings, 1075 Pendergast Street, Victoria, British Columbia.

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DISTRICT ELECTORAL OFFICER of North Coast, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Victoria-Hillside, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Saanich South, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Surrey-Newton, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Cowichan-Ladysmith, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Prince George North, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Burnaby-Edmonds, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of North Island, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Burnaby Willingdon, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Esquimalt-Metchosin, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Surrey-Whalley, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Burrard, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Mission-Kent, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Vancouver-Fraserview, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Kootenay, 1075 Pendergast Street, Victoria, British Columbia.

DISTRICT ELECTORAL OFFICER of Cariboo South, 1075 Pendergast Street, Victoria, British Columbia.

SUE HAMMELL, Member of the Legislative Assembly for the electoral district of Surrey-Green Timbers, Parliament Buildings, Victoria, British Columbia.

LOIS BOONE, Member of the Legislative Assembly for the electoral district of George-Mount Robson, Parliament Buildings, Victoria, British Columbia.

GRAEME BOWBRICK, Member of the Legislative Assembly for the electoral district of New Westminster, Parliament Buildings, Victoria, British Columbia.

GRETCHEN BREWIN, Member of the Legislative Assembly for the electoral district of Victoria-Beacon Hill, Parliament Buildings, Victoria, British Columbia.

PIETRO CALENDINO, Member of the Legislative Assembly for the electoral district of Burnaby North, Parliament Buildings, Victoria, British Columbia.

JOHN CASHORE, Member of the Legislative Assembly for the electoral district of Coquitlam, Maillardville, Parliament Buildings, Victoria, British Columbia.

GLEN CLARK, Member of the Legislative Assembly for the electoral district of Vancouver-Kingsway, Parliament Buildings, Victoria, British Columbia.

ED CONROY, Member of the Legislative Assembly for the electoral district of Rossland-Trail, Parliament Buildings, Victoria, British Columbia.

UJJAL DOSANJH, Member of the Legislative Assembly for the electoral district of Vancouver-Kensington, Parliament Buildings, Victoria, British Columbia.

JIM DOYLE, Member of the Legislative Assembly for the electoral district of Columbia River-Revelstoke, Parliament Buildings, Victoria, British Columbia.

CORKY EVANS, Member of the Legislative Assembly for the electoral district of Nelson-Creston, Parliament Buildings, Victoria, British Columbia.

MIKE FARNWORTH, Member of the Legislative Assembly for the electoral district of Port Coquitlam, Parliament Buildings, Victoria, British Columbia.

HELMUT GIESBRECHT, Member of the Legislative Assembly for the electoral district of Skeena, Parliament Buildings, Victoria, British Columbia.

EVELYN GILLESPIE, Member of the Legislative Assembly for the electoral district of Comox Valley, Parliament Buildings, Victoria, British Columbia.

BILL GOODACRE, Member of the Legislative Assembly for the electoral district of Bulkley Valley-Stikine, Parliament Buildings, Victoria, British Columbia.

BILL HARTLEY, Member of the Legislative Assembly for the electoral district of Maple Ridge-Pitt Meadows, Parliament Buildings, Victoria, British Columbia.

GERARD JANSSEN, Member of the Legislative Assembly for the electoral district of Alberni, Parliament Buildings, Victoria, British Columbia.

RICK KASPER, Member of the Legislative Assembly for the electoral district of Malahat-Juan de Fuca, Parliament Buildings, Victoria, British Columbia.

JENNY WAI CHING KWAN, Member of the Legislative Assembly for the electoral district of Vancouver, Mount Pleasant, Parliament Buildings, Victoria, British Columbia.

HARRY LALI, Member of the Legislative Assembly for the electoral district of Yale-Lillooet, Parliament Buildings, Victoria, British Columbia.

DALE LOVICK, Member of the Legislative Assembly for the electoral district of Nanaimo, Parliament Buildings, Victoria, British Columbia.

JOY MACPHAIL, Member of the Legislative Assembly for the electoral district of Vancouver-Hastings, Parliament Buildings, Victoria, British Columbia.

CATHY MCGREGOR, Member of the Legislative Assembly for the electoral district of Kamloops, Parliament Buildings, Victoria, British Columbia.

DAN MILLER, Member of the Legislative Assembly for the electoral district of North Coast, Parliament Buildings, Victoria, British Columbia.

STEVE ORCHERTON, Member of the Legislative Assembly for the electoral district of Victoria-Hillside, Parliament Buildings, Victoria, British Columbia.

ANDREW PETTER, Member of the Legislative Assembly for the electoral district of Saanich South, Parliament Buildings, Victoria, British Columbia.

PENNY PRIDDY, Member of the Legislative Assembly for the electoral district of Surrey-Newton, Parliament Buildings, Victoria, British Columbia.

JAN PULLINGER, Member of the Legislative Assembly for the electoral district of Cowichan-Ladysmith, Parliament Buildings, Victoria, British Columbia.

PAUL RAMSEY, Member of the Legislative Assembly for the electoral district of Prince George North, Parliament Buildings, Victoria, British Columbia.

FRED RANDALL, Member of the Legislative Assembly for the electoral district of Burnaby-Edmonds, Parliament Buildings, Victoria, British Columbia.

GLENN ROBERTSON, Member of the Legislative Assembly for the electoral district of North Island, Parliament Buildings, Victoria, British Columbia.

JOAN SAWICKI, Member of the Legislative Assembly for the electoral district of Burnaby Willingdon, Parliament Buildings, Victoria, British Columbia.

MOE SIHOTA, Member of the Legislative Assembly for the electoral district of Esquimalt-Metchosin, Parliament Buildings, Victoria, British Columbia.

JOAN SMALLWOOD, Member of the Legislative Assembly for the electoral district of Surrey-Whalley, Parliament Buildings, Victoria, British Columbia.

TIM STEVENSON, Member of the Legislative Assembly for the electoral district of Vancouver-Burrard, Parliament Buildings, Victoria, British Columbia.

DENNIS STREIFEL, Member of the Legislative Assembly for the electoral district of Mission-Kent, Parliament Buildings, Victoria, British Columbia.

IAN WADDELL, Member of the Legislative Assembly for the electoral district of Vancouver-Fraserview, Parliament Buildings, Victoria, British Columbia.

ERDA WALSH, Member of the Legislative Assembly for the electoral district of Kootenay, Parliament Buildings, Victoria, British Columbia.

DAVID ZIRNHELT, Member of the Legislative Assembly for the electoral district of Cariboo South, Parliament Buildings, Victoria, British Columbia.

THE NEW DEMOCRATIC PARTY OF BRITISH COLUMBIA, 3110 Boundary Road, Burnaby, British Columbia.

Let all persons whose interests may be affected by the order sought TAKE NOTICE that the Petitioner applies to court for the relief set out in this Petition.

IF YOU WISH TO BE HEARD at the hearing of the Petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the Petitioner address for delivery, which is set out in this Petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the Petitioner may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

The address of the registry is: The Law Courts
800 Smithe Street
Vancouver, B.C. V6Z 2E1

The address for delivery is: In care of DEVLIN JENSEN
Barristers & Solicitors
2550 - 555 West Hastings Street

Vancouver, B.C. V6B 4N5.
Attn: Peter Jensen, Esq.

The name and office address of
the Petitioners' solicitor is:

DEVLIN JENSEN
Barristers & Solicitors
2550 - 555 West Hastings Street
Vancouver, B.C. V6B 4N5.
Attn: Peter Jensen, Esq.

The Petitioner applies to this Court for Orders that:

- I This proceeding be certified as a class proceeding and the Petitioner, Leonard Friesen, be the representative Petitioner.
- II
 - a. The Respondents, and each of them, be declared to have contravened S. 256(2)(c) of the *Election Act* by virtue of :
 - (i) As to the organization Respondent, The New Democratic Party of British Columbia, and the individual Respondents, Clark and Petter, by fraudulent means, having compelled, persuaded or otherwise caused an individual to vote for a candidate of a particular party in each election in the general provincial election held in British Columbia on May 28, 1996;
 - (ii) Further, as to all individual M.L.A. Respondents, by fraudulent means, having compelled, persuaded or otherwise caused an individual to vote for a candidate of a particular political party in the particular election in the general provincial election held in British Columbia on May 28, 1996 in which that individual Respondent was a candidate.
 - b. The election of New Democratic Party candidate, Sue Hammell, in the electoral district of Surrey- Green Timbers in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
 - c. The election of New Democratic Party candidate, Lois Boone, in the electoral district of Prince George-Mount Robson in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
 - d. The election of New Democratic Party candidate, Graeme Bowbrick, in the electoral district of New Westminster in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents'

violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- e. The election of New Democratic Party candidate, Gretchen Brewin, in the electoral district of Victoria-Beacon Hill in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- f. The election of New Democratic Party candidate, Pietro Calendino, in the electoral district of Burnaby North in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- g. The election of New Democratic Party candidate, John Cashore, in the electoral district of Coquitlam-Maillardville in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- h. The election of New Democratic Party candidate, Glen Clark, in the electoral district of Vancouver-Kingsway in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- i. The election of New Democratic Party candidate, Ed Conroy, in the electoral district of Rossland-Trail in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- j. The election of New Democratic Party candidate, Ujjal Dosanjh, in the electoral district of Vancouver-Kensington in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- k. The election of New Democratic Party candidate, Jim Doyle, in the electoral district of Columbia River-Revelstoke in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- l. The election of New Democratic Party candidate, Corky Evans, in the electoral district of Nelson-Creston in the general provincial election of May 28, 1996, be declared invalid and

that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- m. The election of New Democratic Party candidate, Mike Farnworth, in the electoral district of Port Coquitlam in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- n. The election of New Democratic Party candidate, Helmut Giesbrecht, in the electoral district of Skeena in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- o. The election of New Democratic Party candidate, Evelyn Gillespie, in the electoral district of Comox Valley in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- p. The election of New Democratic Party candidate, Bill Goodacre, in the electoral district of Bulkley Valley-Stikine in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- q. The election of New Democratic Party candidate, Bill Hartley, in the electoral district of Maple Ridge-Pitt Meadows in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- r. The election of New Democratic Party candidate, Gerard Janssen, in the electoral district of Alberni in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- s. The election of New Democratic Party candidate, Rick Kasper, in the electoral district of Malahat-Juan de Fuca in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- t. The election of New Democratic Party candidate, Jenny Wai Ching Kwan, in the electoral district of Vancouver-Mount Pleasant in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- u. The election of New Democratic Party candidate, Harry Lali, in the electoral district of Yale-Lillooet in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- v. The election of New Democratic Party candidate, Dale Lovick, in the electoral district of Nanaimo in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- w. The election of New Democratic Party candidate, Joy MacPhail, in the electoral district of Vancouver-Hastings in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- x. The election of New Democratic Party candidate, Cathy McGregor, in the electoral district of Kamloops in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- y. The election of New Democratic Party candidate, Dan Miller, in the electoral district of North Coast in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- z. The election of New Democratic Party candidate, Steve Orcherton, in the electoral district of Victoria-Hillside in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- aa. The election of New Democratic Party candidate, Andrew Petter, in the electoral district of Saanich South in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section

256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- bb. The election of New Democratic Party candidate, Penny Priddy, in the electoral district of Surrey-Newton in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- cc. The election of New Democratic Party candidate, Jan Pullinger, in the electoral district of Cowichan-Ladysmith in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- dd. The election of New Democratic Party candidate, Paul Ramsey, in the electoral district of Prince George North in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ee. The election of New Democratic Party candidate, Fred Randall, in the electoral district of Burnaby-Edmonds in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ff. The election of New Democratic Party candidate, Glenn Robertson, in the electoral district of North Island in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- gg. The election of New Democratic Party candidate, Joan Sawicki, in the electoral district of Burnaby Willingdon in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- hh. The election of New Democratic Party candidate, Moe Sihota, in the electoral district of Esquimalt-Metchosin in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ii. The election of New Democratic Party candidate, Joan Smallwood, in the electoral district of Surrey-Whalley in the general provincial election of May 28, 1996, be declared invalid

and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

- jj. The election of New Democratic Party candidate, Tim Stevenson, in the electoral district of Vancouver-Burrard in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- kk. The election of New Democratic Party candidate, Dennis Streifel, in the electoral district of Mission-Kent in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- ll. The election of New Democratic Party candidate, Ian Waddell, in the electoral district of Vancouver-Fraserview in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- mm. The election of New Democratic Party candidate, Erda Walsh, in the electoral district of Kootenay in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- nn. The election of New Democratic Party candidate, David Zirmhelt, in the electoral district of Cariboo South in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

This petition is supported by the affidavit of Douglas V. Bjorkman sworn the 27th day of August, 1996 as to the facts on which the application is based.

At the hearing of this Petition will be led the oral evidence of the Petitioner, Leonard Friesen, and other members of the class represented by him verifying the facts of the Petition herein pursuant to Section 150 of the Election Act.

The facts upon which this Petition is based are as follows:

1. The Petitioner, Leonard Friesen ("Friesen"), resides in the electoral district of Surrey-Green Timbers, British Columbia.

2. The Petitioner, Holly Kuzenko ("Kuzenko"), resides in the electoral district of New Westminster, British Columbia.
3. The Petitioner, Mildred Umbargen ("Umbargen"), resides in the electoral district of Rossland-Trail, British Columbia.
4. The Petitioners, Friesen, Kuzenko and Umbargen, are representative of the class of persons who voted in the general provincial election held on May 28, 1996 and are aggrieved as a result of the misrepresentations of the Respondents, their servants and agents as hereinafter particularized (the "Class").
5. The Respondent, Sue Hammell ("Hammell"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Green Timbers in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
6. The Respondent, Lois Boone ("Boone"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Prince George-Mount Robson in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
7. The Respondent, Graeme Bowbrick ("Bowbrick"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of New Westminster in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
8. The Respondent, Gretchen Brewin ("Brewin"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Victoria-Beacon Hill, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
9. The Respondent, Pietro Calendino ("Calendino"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Burnaby North, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
10. The Respondent, John Cashore ("Cashore"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Coquitlam-Maillardville, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
11. The Respondent, Glen Clark ("Clark"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Kingsway, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

12. The Respondent, Ed Conroy ("Conroy"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Rossland-Trail, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
13. The Respondent, Ujjal Dosanjh ("Dosanjh"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Kensington, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
14. The Respondent, Jim Doyle ("Doyle"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Columbia river-Revelstoke, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
15. The Respondent, Corky Evans ("Evans"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Nelson-Creston, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
16. The Respondent, Mike Farnworth ("Farnworth"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Port Coquitlam, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
17. The Respondent, Helmut Giesbrecht ("Giesbrecht"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Skeena, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
18. The Respondent, Evelyn Gillespie ("Gillespie"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Comox Valley, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
19. The Respondent, Bill Goodacre ("Goodacre"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Bulkley Valley-Stikine, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
20. The Respondent, Bill Hartley ("Hartley"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Maple Ridge-Pitt Meadows, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
21. The Respondent, Gerard Janssen ("Janssen"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Alberni, in the

general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

22. The Respondent, Rick Kasper ("Kasper"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Malahat-Juan de Fuca, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
23. The Respondent, Jenny Wai Ching Kwan ("Kwan"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Mount Pleasant, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
24. The Respondent, Harry Lali ("Lali"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Yale-Lillooet, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
25. The Respondent, Dale Lovick "Lovick", was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Nanaimo, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
26. The Respondent, Joy MacPhail ("MacPhail"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Hastings, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
27. The Respondent, Cathy McGregor ("McGregor"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Kamloops, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
28. The Respondent, Dan Miller ("Miller"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of North Coast, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
29. The Respondent, Steve Orcherton ("Orcherton"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Victoria-Hillside, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
30. The Respondent, Andrew Petter ("Petter"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Saanich South, in

the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

31. The Respondent, Penny Priddy ("Priddy"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Newton, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
32. The Respondent, Jan Pullinger ("Pullinger"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Cowichan-Ladysmith, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
33. The Respondent, Paul Ramsey ("Ramsey"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Prince George North, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
34. The Respondent, Fred Randall ("Randall"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Burnaby-Edmonds, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
35. The Respondent, Glenn Robertson ("Robertson"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of North Island, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
36. The Respondent, Joan Sawicki ("Sawicki"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Burnaby Willingdon, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
37. The Respondent, Moe Sihota ("Sihota"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Esquimalt-Metchosin, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
38. The Respondent, Joan Smallwood ("Smallwood"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Whalley, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
39. The Respondent, Tim Stevenson ("Stevenson"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Burrard, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

40. The Respondent, Dennis Streifel ("Streifel"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Mission-Kent, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
41. The Respondent, Ian Waddell ("Waddell"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Vancouver-Fraserview, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
42. The Respondent, Erda Walsh ("Walsh"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Kootenay, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
43. The Respondent, David Zirnelt ("Zirnelt"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Cariboo South, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
44. The Respondent New Democratic Party of British Columbia ("N.D.P.") is a registered political party pursuant to the Election Act of the Province of British Columbia.
45. The Respondent, Clark, is the leader of the Respondent, New Democratic Party of British Columbia, and is presently the Premier minister of Her Majesty's Government for the Province of British Columbia.
46. During the election campaign preceding the provincial general election held on May 28, 1996 up to and including the election day the N.D.P., through its leader Clark, its agents and its endorsed candidates, including the individual M.L.A. Respondents, and the agents of the endorsed candidates, by diverse methods and on diverse occasions misrepresented a number of material facts in order to induce potential voters, including the Petitioners, to vote for candidates endorsed by the Respondent, New Democratic Party.
47. In particular the misrepresentations made by the Respondents to fraudulently persuade the Petitioners and other members of the electorate to vote for the candidates endorsed by the Respondent, New Democratic Party, include the following:
 - a. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1995-96 fiscal year was in surplus;
 - b. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1996-97 fiscal year would be in surplus, and

c. that as a further consequence of such fiscal prudence the Government of British Columbia was able to afford a capital development program in an amount of \$250,000,000 to improve the Province's infrastructure, including schools, transport, and other facilities.

48. The statements particularized in the preceding paragraph were false and known to be false at the time they were made and the Respondents further concealed the information required to ascertain the veracity or lack thereof of the misrepresentations.
49. The nature of the information contained in the misrepresentations is of such a kind that the N.D.P. and the candidates endorsed by it knew that some or all of the misrepresentations were false and further, the said parties disseminated such false information for the purpose of inducing the members of the electorate to vote for the candidates endorsed by the N.D.P., knowing that such misrepresentations were central to the concerns of the voters. By doing so the Respondents contravened the Election Act by inducing or causing an individual to vote, by fraudulent means within the meaning of section 256 (2) of the Election Act, to elect the candidates endorsed by the N.D.P..
50. In the alternative to paragraph 48 above, if the N.D.P., and its endorsed candidates, did not actually know whether the misrepresentations were true or false, then they were willfully blind to or indifferent to the truth of the misrepresentations as alleged and the statements were merely manufactured without belief in or concern for the truth of the misrepresentations, for the purpose of inducing individuals to vote, by fraudulent means, within the meaning of section 256(2) of the Election Act, to elect the candidates endorsed by the N.D.P..
51. The Petitioners, Friesen, Kuzenko, Umbargen, and the voters were caused and induced to vote for the candidates endorsed by the N.D.P. by the aforesaid fraudulent misrepresentations and had they known the truth they would not have voted for the said candidates.

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of

June, 1996

" Peter J. J. J. "
Solicitor for the Petitioners







[Indexed as: Friesen v. Hammel]

Leonard Freisen, Holly Kuzenko, Mildred Umbargen, and The Members of the Class of Persons caused to vote for the candidate of a particular political party in the general provincial election held on the 28th day of May, 1996, as a result of a violation of section 256 of the Election Act of British Columbia (Petitioners) and Sue Hammel, Lois Boone, Graeme Bowbrick, Gretchen Brewin, Pietro Calendino, John Cashore, Glen Clark, Ed Conroy, Ujjal Dosanjh, Jim Doyle, Corky Evans, Mike Farnworth, Helmut Giesbrecht, Evelyn Gillespie, Bill Goodacre, Bill Hartley, Gerard Janssen, Rick Kasper, Jenny Wai Ching Kwan, Harry Lali, Dale Lovick, Joy MacPhail, Cathy McGregor, Dan Miller, Steve Orcherton, Andrew Petter, Penny Priddy, Jan Pullinger, Paul Ramsey, Fred Randall, Glenn Robertson, Joan Sawicki, Moe Sihota, Joan Smallwood, Tim Stevenson, Dennis Streifel, Ian Waddell, Erda Walsh, David Simhelt, and the New Democratic Party of British Columbia (Respondents)

Supreme Court
Esson C.J.S.C.

Heard – February 5 and 6, 1997.

Judgment – February 27, 1997.

Elections – Practice and procedure on controverted elections – In federal and provincial elections – Petitions – Sufficiency of petition – Voters bringing petition against political party and its members, alleging fraud – Pleadings not setting out particulars – Party and members not demanding particulars – Party and members bringing motion for order dismissing petition – Party and members arguing that petition had no chance of success – Failure to provide particulars not falling within grounds for dismissal of petition under R. 19(24) – Party and members being able to bring motion under R. 19(16) if voters failed to provide particulars after demand being made – Motion dismissed – Election Act, S.B.C. 1995, c. 51, s. 256 – British Columbia, Rules of Court, R. 19(11), 19(16), 19(24).

Three voters in three electoral districts of the province brought a petition against a political party and 39 of its members. The voters claimed that the party and

the members did, by fraudulent means, compel, persuade, or otherwise cause an individual to vote for the party candidate in an election, contrary to s. 256 of the *Election Act* (B.C.). The voters alleged that the party and the members, or their agents, made false statements regarding the state of the provincial budget and planned capital expenditures. It was further alleged that they knew the representations were false, or were indifferent to their truth, that they disseminated the false statements to induce voters to vote for them, and that it caused voters to so vote. The pleadings did not set out the particulars of those elements. The relief claimed was a declaration that the election of those 39 members was invalid. Rule 19(11) of the British Columbia *Rules of Court* provides that full particulars must be supplied where fraud is alleged. The party and the members did not demand particulars. Prior to the voters' application for certification as a class action, the party and the members brought a motion for an order dismissing the petition, making arguments including that even on the pleadings, the petition had no chance of success.

Held – Motion dismissed.

Although the party and members could not know what specific allegations they had to face on the basis of the petition in its present state, it was not established that the failure to provide particulars should allow the party and members to have the petition dismissed under R. 19(24). A failure to provide particulars, in itself, does not fall within the grounds listed under R. 19(24), nor does it satisfy the test for striking out under the case law. In addition, R. 19(11) does not support the position that the petition should be dismissed. In the event that the party and members demanded particulars and the voters failed to provide them, the party and members could bring a motion under R. 19(16). Arguments made by the party and members on other issues would have to await the certification motions.

Cases considered

- Daco Developments Ltd. v. Norman Lewis Co. (False Creek Electric Ltd.)*, [1982] 2 W.W.R. 277, 33 B.C.L.R. 273, 25 C.P.C. 138, 132 D.L.R. (3d) 112 (C.A.) – considered.
- Gadbois v. Copping Agencies Ltd.*, [1983] 3 W.W.R. 459, 43 B.C.L.R. 168, 36 C.P.C. 192 (Co. Ct.) – considered.
- Hunt v. T & N plc*, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 – applied.
- Insurance Corp. of British Columbia v. Piche* (1983), 44 B.C.L.R. 90, 1 C.C.L.I. 155, 35 C.P.C. 305 (C.A.) – distinguished.
- Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315, 2 C.P.C. (2d) 184, 18 D.L.R. (4th) 391 (C.A.) – considered.
- Lui v. West Granville Manor Ltd.*, 11 B.C.L.R. (2d) 273, [1987] 4 W.W.R. 49, 20 C.P.C. (2d) 166 (C.A.) – applied.
- Minnes v. Minnes* (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C. C.A.) – considered.
- West Fraser Mills Ltd. v. Chouinard* (1993), 79 B.C.L.R. (2d) 321, 15 C.P.C. (3d) 1, 27 B.C.A.C. 311, 45 W.A.C. 311 (C.A.) – considered.
- Westbank Indian Band v. Normand* (1993), [1994] 3 C.N.L.R. 197 (B.C. S.C.) –

considered.

Wyman v. Vancouver Real Estate Board (No. 2) (1957), 22 W.W.R. 133, 8 D.L.R. (2d) 724 (B.C. C.A.) – considered.

Statutes considered

Class Proceedings Act, S.B.C. 1995, c. 21

s. 2(4) – referred to.

s. 4(1)(a) – considered.

s. 39 – considered.

Election Act, S.B.C. 1995, c. 51

Pt. 12 – referred to.

s. 90(3) – referred to.

s. 150 – considered.

s. 150(3) – considered.

s. 150(4) – considered.

s. 150(7) – referred to.

s. 150(8) – referred to.

s. 150(10) – referred to.

s. 151 – considered.

s. 151(2) – referred to.

s. 256 – considered.

s. 256(1) – considered.

s. 256(2) – referred to.

s. 256(2)(c) – considered.

Interpretation Act, R.S.B.C. 1979, c. 206 – referred to.

Limitation Act, R.S.B.C. 1979, c. 236

s. 4 – referred to.

s. 4(1) – considered.

s. 4(1)(d) – considered.

Rules considered:

British Columbia, Rules of Court

R. 5(9) – considered.

R. 19(11) – considered.

R. 19(16) – referred to.

R. 19(24) – considered.

MOTION for order dismissing petition.

David Lunny, for petitioners.

E. David Crossin, for respondents, except Dale Lovick and New Democratic Party.

Ian D. Aikenhead, Q.C., for Dale Lovick.

John Waddell, Q.C., for Chief Electoral Officer.

Robert McDiarmid, Q.C., for New Democratic Party.

(Doc. Vancouver A962818)

February 27, 1997. ESSON C.J.S.C.: –

I

1 In this case, the petitioners, being three voters in three of the electoral districts of British Columbia, claim against the respondents, the elected New Democratic party members in 39 ridings and the New Democratic Party of British Columbia, that the elected members and the New Democratic Party did by fraudulent means compel, persuade or otherwise cause an individual to vote for the New Democratic Party candidate in the May 28, 1996 general election contrary to s. 256 of the *Election Act* 1995.

2 The fraudulent means relate to alleged statements that the budget of the Government for the 1995-96 fiscal year was in surplus, that it had been fiscally prudent and that as a result the budget for the 1996-97 year would be in surplus and able to afford a capital development program in the amount of \$250 million to improve the Province's infrastructure including schools, transport and other facilities. The allegation is that these representations were made when they were known to be false and that further information was concealed from the voters.

3 The relief they seek, as a result thereof, is that the election of those 39 members be declared invalid.

4 The motions by the respondents before me are brought in an effort to dismiss the petition before it can be heard on the merits, on the basis that even on the pleadings in the petition, it has no chance of success.

5 The Chief and District Electoral Officers in respect of the election become parties to those proceedings by virtue of s. 150 (7) and (8) of the *Election Act*.

II

6 The respondents are separately represented in three groups: (1) Dale Lovick, (2) the New Democratic Party and (3) all named respondents except Dale Lovick and the New Democratic Party. They join together in these preliminary applications to dismiss the petition before the petitioners' application for certification as a Class Action is heard.

7 The fraudulent means alleged in the petition are:

46. During the election campaign preceding the provincial general election held on May 28, 1996 up to and including the election day the N.D.P., through its leader Clark, its agents and its endorsed candidates, including the individual M.L.A. Respondents, and the agents of the endorsed candidates, by diverse methods and on diverse occasions misrepresented a number of material facts in order to induce potential voters,

including the Petitioners, to vote for candidates endorsed by the Respondent, New Democratic Party.

47. In particular the misrepresentations made by the Respondents to fraudulently persuade the Petitioners and other members of the electorate to vote for the candidates endorsed by the Respondent, New Democratic Party, include the following:

a. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1995-96 fiscal year was in surplus;

b. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1996-97 fiscal year would be in surplus, and

c. that as a further consequence of such fiscal prudence the Government of British Columbia was able to afford a capital development program in an amount of \$250,000,000 to improve the Province's infrastructure, including schools, transport, and other facilities.

48. The statements particularized in the preceding paragraph were false and known to be false at the time they were made and the Respondents further concealed the information required to ascertain the veracity or lack thereof of the misrepresentations.

49. The nature of the information contained in the misrepresentation is of such a kind that the N.D.P. and the candidates endorsed by it knew that some or all of the misrepresentations were false and further, the said parties disseminated such false information for the purpose of inducing the members of the electorate to vote for candidates endorsed by the N.D.P., knowing that such misrepresentations were central to the concerns of the voters. By doing so the Respondents contravened the Election Act by inducing or causing an individual to vote, by fraudulent means within the meaning of section 256(2) of the Election Act, to elect the candidates endorsed by the N.D.P.

50. In the alternative to paragraph 48 above, if the N.D.P., and its endorsed candidates, did not actually know whether the misrepresentations were true or false, then they were willfully blind to or indifferent to the truth of the misrepresentations as alleged and the statements were merely manufactured without belief in or concern for the truth of the misrepresentations, for the purpose of inducing individuals to vote, by fraudulent means, within the meaning of section 256(2) of the Election Act, to elect the candidates endorsed by the N.D.P.

51. The Petitioners, Friesen, Kuzenko, Umbargen, and the voters were caused and induced to vote for the candidates endorsed by the N.D.P. by the aforesaid fraudulent misrepresentations and had they known the truth they would not have voted for the said candidates.

8 The motions under s. 150 of the *Election Act* and Rule 19(24) of the *Supreme Court Rules* ask that the petition be struck in whole or in part on the grounds that it fails to disclose a reasonable cause of action and that it fails to comply with s. 150 of the *Election Act*.

9 Although some specific arguments were made with reference to one of the groups of respondents only, because counsel generally adopted each others argument, I propose to simply set forth and deal with the arguments irrespective of which respondent presented them.

THE ISSUES

A. The Late Filing Issue

10 The *Election Act*, s. 150(3) reads as follows:

(3) The time limit for making an application is as follows:

(a) if the application is on the basis that section 255, 256, 257 or 258 was contravened, 3 months after the date of the contravention or 30 days after the return of the writ for the election, whichever is later;

(b) in other cases, 30 days after the return of the writ for the election.

- S. 150(3) provides for a three month time limit within which the petition must be filed.
- The petition was not filed until August 27, 1996 precisely three months (under the *Interpretation Act*) from the date of the election May 28, 1996.
- Because the fraudulent means depends upon representations made during the election, and because no campaigning may take place on the day of the election itself, at very best, the petition is one day out of time.

B. The Standing Issue

11 Section 150 (4) reads:

An application may be made only by a candidate in the election, the chief electoral officer or a voter for the electoral district for which the election was held.

- Under s. 150(4) only (in these circumstances) a voter for the electoral district for which the election was held may bring an application.
- Only three voters in the electoral district of Surrey-Green Timbers, New Westminster and Rossland-Trail have, as voters brought an application.

- The three months for bringing such an application have clearly passed. For these reasons, the petition against the remaining 36 elected members must be dismissed. The respondents say that the petitioners have no standing to bring such an application in ridings where they are not voters.

C. The Pleadings Issue

- 12 The respondents are entitled to know the case against them. It cannot be seen from the pleadings in this action which of the respondents if any made which representations to whom at what time inducing which persons to vote for which candidates. The petition they say must be dismissed as contravening Rule 19(11), which states:

Where the party pleading relies on misrepresentation, fraud, breach of trust, willful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.

- 13 The respondents also argue that on the basis of the common law in an action for fraud the material facts must be pleaded and they have not been.

D. The Class Action Issue

- 14 The respondents argue that the *Class Proceedings Act* cannot save the petition since it is a procedural mechanism and can only apply where a cause of action exists.

E. The New Democratic Party Issue

- 15 The respondent New Democratic Party contends that the claim against the New Democratic Party must be dismissed for two reasons:

(a) there is no remedy which could be granted against the New Democratic Party – it cannot be “unseated” since it is not an elected member;

(b) no declaration could be granted against it since to do so would amount to a declaration that it had committed a breach of the *Act* and that can only be dealt with by a charge under Part 12 of the *Election Act*.

F. Miscellaneous Issues

- 16 A number of other issues were raised such as:
- (a) it is not possible for this action to succeed since it is an offence under s. 90(3) of the *Election Act* to require a voter to reveal how he or she voted in any legal proceeding and accordingly it would be impossible to obtain evidence to prove how or why anyone voted;
 - (b) It is not practical for the action to proceed because of s. 150(10) which requires that all evidence must be oral—an impossible requirement, particularly in light of s. 90(3) above.
 - (c) Since s. 151(2) requires the court to be satisfied that the election was conducted in good faith, in accordance with the principles of the Act, and that the irregularity or contravention did not materially effect the result of the election, it would be impossible for the petitioners to prove same;
 - (d) The three voters/petitioners may have voted in the advance pole and not the general election making them even further out of time;

DECISION**A. The Late Filing Issue**

- 17 Are the petitioners out of time since the fraudulent representations of which they complain (being the contraventions of the Act) were made more than three months before the date of the filing of the petition?
- 18 The wording of s. 256(2)(c) is to “compel, persuade or otherwise cause an individual to vote” by fraudulent means. The activity prohibited here involves the causing of individuals to vote. There is in my view no contravention of the Act until individuals vote since they cannot have been compelled, persuaded or otherwise caused to vote by fraudulent means until they actually do vote. When the three petitioners voted is not completely clear, but s. 4 of the facts set forth in the Petition says:
- The petitioners, Friesen, Kuzenko and Umbargen are representatives of the class of persons who voted in the general provincial election held on May 28, 1996. . .
- 19 The petitioners swore that the petition is true and while it may not be conclusive that they actually voted on May 28th, it seems to me at this stage of the proceedings that is a matter of evidence. If they did, they may have been compelled, persuaded or caused to do so by virtue of the fraudulent means alleged.

- 20 As a result I cannot say at this stage of the case that the three petitioners have failed to file their petition within the three months prescribed by s. 150(3).

B. The Standing Issue

- 21 Do the petitioners have standing in the remaining 36 electoral districts since they are not voters, under s. 150(4), in the electoral district for which the election was held? The respondents contend on the basis of Rule 19(24) that the court should strike the petition as it relates to those 36 electoral districts.

- 22 The petitioners argue that this is not a proper case to be determined under Rule 19(24) and in addition, any problem of standing may be cured by three separate means:

1. *Rule 5(9) of the Rules of Court* provides no proceeding is to be defeated by misjoinder or nonjoinder.
2. *Section 4(1)(d) of the Limitations Act* states the lapse of time is no bar to adding or substituting a party with respect to any claims relating to or connected with the original action.
3. *The Class Proceedings Act* provides that a representative plaintiff not a member of the class may be appointed.

1. *R. 5(9) of the Rules* reads:

No proceeding shall be defeated by reason of the misjoinder or nonjoinder of a party and the court may deal with the matter in controversy so far as it affects the rights and interests of the parties before it.

- 23 The petitioners contend that this Rule permits new voters from the 36 electoral districts, or their representatives, to be added notwithstanding the three month limitation period. The respondents argue that R. 5(9) while saving a misjoinder or nonjoinder from defeat cannot create a cause of action that does not now exist.

- 24 This rule was considered in *Insurance Corp. of British Columbia v. Piche* (1983), 44 B.C.L.R. 90 (C.A.). In that case ICBC had a subrogated claim against the defendant, Piche. According to the applicable legislation, the action should have been brought in the name of the insured; however, ICBC did not realize this until after the expiry of the limitation period. ICBC, having no cause of action against the defendant, applied to add or substitute the insured as plaintiff. The Court allowed the substitution because there was a misjoinder of the parties. The petitioners rely upon this case, but it seems to me that while the cases have a certain similarity in that neither ICBC nor any new petitioners have a cause of

action after the limitation period expires, ICBC had a subrogated claim against the defendant whereas it cannot be said that the three petitioners have any claim against the 36 MLA respondents.

- 25 In *Piche*, MacFarlane J.A. noted that ICBC had rights and interests that were affected by the misjoinder. He stated at p. 94:

Rule 5(9) provides that no proceeding shall be defeated by reason of the misjoinder of a party and the court may deal with the matter in controversy so far as it affects the rights and interests of the parties before it. The matter in controversy in this action is the subrogated claim of the Insurance Corporation of British Columbia, who have paid Lehmann's loss, to recover from the respondent damages for his negligence in causing the fire. The Insurance Corporation of British Columbia has rights and interests which are affected, as does the respondent.

- 26 Unlike *Piche*, it can hardly be said here that the petitioners have a recognizable right or interest in any of the ridings other than the three in which they voted.

- 27 Also it should be noted that the purpose of Rule 5(9) is to allow the Court to deal with rights and interests *of the parties before it* which would be affected by a misjoinder or nonjoinder. There is nothing to indicate that the three petitioners are in that position.

- 28 In *Westbank Indian Band v. Normand* (1993), [1994] 3 C.N.L.R. 197, Drossos, J. of this Court, in considering Rule 5(9), said:

Rule 5(9) is of no assistance to Mr. Swite. The intent of that Rule is not to require the Court to join a party not before it, but to the contrary, to permit the Court in such a case to deal with the rights and interests in issue of those parties who are before the Court. In other words, failure to join a party will not defeat the continuing of the proceedings to a determination of the rights and interests of those parties before the Court.

- 29 I agree with the applicant respondents that R.5(9) is unavailable to the petitioners on the facts of this case.

2. The Limitation Act

- 30 The petitioners argue here that they should not be barred from adding or substituting a party in light of 4(1)(d) of the *Limitation Act*. That section reads in part:

4. (1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(d) adding or substituting of a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

- 31 The petitioners of course contend that this is exactly the kind of case to which this provision applies and that it is to be noted, it is applicable either under the *Limitation Act* "or any other Act".
- 32 The respondents argue that if s. 4(1) reads in the manner the petitioners suggest, it would render meaningless any time limit in any statutes including the three month limitation in the *Election Act*. The respondents argue further that it is very important under the *Election Act* that the citizens in an electoral district quickly find out who their properly elected member is, or is to be.
- 33 The petitioners also rely upon *Daco Developments Ltd. v. Norman Lewis Co. (False Creek Electric Ltd.)* (1982), 33 B.C.L.R. 273 (C.A.), *West Fraser Mills Ltd. v. Chouinard* (1993), 79 B.C.L.R. (2d) 321 (C.A.), and *Gadbois v. Copping Agencies Ltd.*, [1983] 3 W.W.R. 459 (B.C. Co. Ct.).
- 34 In each of these cases the plaintiffs shared a common defendant and their claims were related to the same breach or act. In the present case, s. 150(4) of the *Election Act* confines the challenges of an individual election to voters of the electoral district pertaining to that election. Each then necessarily involves an independent claim by different petitioners against different respondent MLAs. It must of course under s. 4(1) be "relating to or connected with the subject matter of the original action". There must according to the case law be dependence or interrelationship between the claims.
- 35 Mr. Justice Lambert considered this provision in *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 (C.A.). In that case Lambert J.A. reaffirmed the guidelines which were set out in an earlier decision involving the same parties, *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315 (C.A.) at 331:

In my opinion, permitting third party proceedings to stand and not be struck out, where the third party proceedings are capable of standing alone as separate cause of action, and where they are brought after the effluxion of a limitation period that would apply if the third party proceedings were standing alone, must depend on the establishment of some real and substantive connection between the third party proceedings and the original action. That real and substantive connection must also operate to explain why the third party proceedings were not brought as an independent action. There must be some degree of dependence by the third party proceedings on the original action before the third party proceedings setting up a separate cause of action can be piggy-backed over the limitation period.

- 36 In that case Lambert J.A. provides some interesting comments about the application of s. 4 which are apropos to the case at bar. In discussing the legislative purpose and the mischief that was sought to be remedied he said at p. 299:

I do not propose to set out a multitude of examples of abuses that could arise if the court is unable to let the fact that a limitation period has expired influence its decisions under the rules relating to joinder, counterclaims and third party proceedings. I will give one example only. There are many others. In one way or another they all depend on dressing up what is really an independent action as if it were subordinate proceedings for which because of s. 4(1), there is no limitation period.

Suppose a car and a bus collide. Ten out of the 20 bus passengers are injured. The driver of the car is entirely at fault. All ten injured bus passengers are represented by the same lawyer. He misses the basic limitation period. But all is well. One of the passengers is an infant. By s. 7 of the Limitation Act, the running of the limitation period is postponed during the period of the infant's minority. So an action is brought on behalf of the infant. It does not matter whether the infant is one of the passengers who was injured. The only thing that matters is that the action on behalf of the infant is brought within the extended limitation period that applies to him. All the other passengers arranged to be joined as plaintiffs. The effect of the joinder, if it is permitted, is to sweep away the defendant's fully accrued limitation defence against all the adult passengers.

I cannot believe that it was intended that s. 4 of the *Limitation Act* should be open to that kind of abuse. Neither the mischief nor the legislative purpose requires such an interpretation.

The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitation period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable.

- 37 In the case at bar, I cannot find that on the facts of this case under the *Election Act* it could ever have been the intention of the legislature to let one voter start an action in one riding and then months or even years later decide to add the other voters or the same voter as their representative for actions in each of the other electoral districts.

3. The Class Proceedings Act

- 38 The petitioners claim that s. 2(4) of the *Class Proceedings Act* must be invoked in order to avoid a substantial injustice to the rest of a class who would be barred from relief. The respondents argue that the petitioners lack of standing cannot be cured by the *Class Proceedings Act*

and that it cannot be invoked with respect to s. 150 of the *Election Act*. Applying the *Class Proceedings Act* to the *Election Act* they argue would defeat the intent of s. 150 which is to expedite applications regarding election irregularities. But more to the point, the *Class Proceedings Act* cannot create a cause of action which does not otherwise exist.

39 They argue further that the *Election Act* and the *Class Proceedings Act* cannot stand together and that the *Election Act* being more specific and more recent, must prevail over the "procedural" *Class Proceedings Act*. Section 151 states of course that an election may not be challenged except by an application under this section.

40 Finally, s. 4(1)(a) of the *Class Proceedings Act* requires that the pleadings disclose a cause of action and of course the respondents contend that they do not.

41 Section 2(4) of the *Class Proceedings Act* relied upon in the petition says:

The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

42 It must be pointed out that the petitioners have brought an application under the *Class Proceedings Act* for certification. That motion has not been argued as yet and I certainly have not heard full argument from either side on the question of certification. I could not therefore be certain until that argument has been made whether s. 2(4) could save the petitioners or not. However, another provision of the *Class Proceedings Act*, s. 39, may be of even greater comfort to the petitioners. It reads as follows:

(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

(a) the member opts out of the class proceeding,

(b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding,

(c) a decertification order is made under section 10,

(d) the class proceeding is dismissed without an adjudication on the merits

(e) the class proceeding is discontinued or abandoned with the approval of the court, or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) If there is a right of appeal in respect of an event described in subsection (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

43 This section appears to leave the question of whether or not the three month limitation period under the *Election Act* is a bar in respect of the 36 ridings until after the class proceedings certification issue is determined and as I indicated to the respondents at the hearing, it may be that some of the issues in their motions may have to await the certification motions.

44 I am not prepared to dismiss the petitioners' petition in respect of the other 36 ridings at this stage of the case in light of s. 39 of the *Class Proceedings Act*.

C. The Pleadings Issue

45 Have the petitioners failed to disclose a reasonable cause of action in the pleadings? The respondents submit that the petition must be struck for failure to so disclose since they have neither pleaded the material facts nor sufficient particulars for them to know the case they have to meet. This is particularly important in an action involving fraudulent means.

46 The key allegations in the petition are set forth in paragraph 46 to 51 in the Petition. (see pages 5-6 above)

47 The respondents note that there are no material facts within these pleadings relating to a specific representation, by whom it was made, when it was made and under what circumstances. The respondents rely upon *Wyman v. Vancouver Real Estate Board (No. 2)* (1957), 8 D.L.R. (2d) 724 (B.C. C.A.) at 726-27 indicating that the essential elements of a claim must be pleaded for the claim to succeed and *Hunt v. T & N plc*, (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273 at 289 where the Supreme Court states that the relevant portions of a statement of claim would be struck or the proceeding dismissed where the outcome is plain and obvious.

48 The respondents rely heavily on Rule 19(11):

Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the

particulars shall deliver the particulars in a separate document either before or with the pleading.

49 They also contend that insufficient particulars have been pleaded.

50 The respondents say that the petitioners must satisfy the court that each respondent or someone acting on his or her behalf made a false representation, knowing that it was false or recklessly not caring whether it was true or false, that they intended the representation to cause someone to vote for them and that the false representation did cause someone to vote for them. Since the pleadings fail to address these issues, the action must be dismissed.

51 The petitioners argue that the respondents' application to dismiss under Rule 19(24) is misconceived, and cannot be used for allegations of insufficiency of pleadings. They rely very strongly on the test applied in *Hunt v. Carey* that pleadings will not be struck under Rule 19(24) provided they can stand as they are or as they might be amended. They contend that the pleadings as they presently stand subject to possible further amendment or particulars do disclose the fraudulent means under s. 256(2)(c).

52 This test in *Hunt v. Carey* is set forth as follows:

Thus, the test in Canada governing the application of provisions like R.19(24) (a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(a).

53 In *Minnes v. Minnes* (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C. C.A.) (a case which was approved in *Hunt v. Carey*) Tysoe J.A., considering an application of the predecessor to Rule 19(24), stated at pp. 122-23:

So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out.

54 As I understand the law, to present a triable case the petitioners' pleadings must contain the following elements:

(a) each individual respondent MLA or someone acting on his or her behalf made a false representation of fact;

(b) each individual respondent or someone acting on his or her behalf made the false representation knowing that it was false or being reckless as to its truth;

(c) each individual respondent or someone acting on his or her behalf made the false representation for the purpose of compelling, persuading or otherwise causing someone to vote for them; and

(d) the misrepresentation in fact compelled, persuaded or otherwise caused someone to vote for the individual respondents (s. 256(2) and (3)).

55 If one reads paras. 46-51 of the petition, the elements are contained therein. What is missing are particulars with respect to those elements. The petitioners have alleged that the respondents or their agents made false statements regarding the state of the provincial budget and planned capital expenditures. They have alleged that the respondents knew the representations were false or that they were indifferent to their truth. They have further asserted that the respondents disseminated the false statements to induce voters to vote for them and that it caused them to so vote. What the pleadings do not set forth are the specifics or particulars of those elements.

56 As Mr. Crossin has argued very forcefully, and I agree, is that parties are entitled to know the case made against them, particularly when fraud is alleged. They must know in order to know how they are to respond and what evidence will be required to defeat the claim.

57 On the basis of the pleadings as they now stand, the respondents cannot know what specific allegations they have to face neither can they know who, where, when and under what circumstances they were made. I am not convinced however that their failure to provide particulars allows the respondent to have the petition dismissed under R.19(24). Rule 19(11) makes it clear that full particulars must be supplied where fraud is alleged. But the respondents here are not seeking particulars they are seeking dismissal or a lack thereof.

58 I do not find that the cases cited or Rule 19(11) support the respondents' position that the petition must be dismissed. A failure to provide particulars in itself does not appear to fall within the grounds listed under R. 19(24) nor does it satisfy the test for striking out as enunciated in *Hunt v. Carey*. The respondents have not demanded particulars from the

petitioner to my knowledge nor have they made an application for an order on the basis that the petitioners have failed to supply same. If the petitioners do fail to provide particulars then of course the respondents may seek an order under R. 19(16).

D. The Class Action

- 59 As I have earlier indicated it would be premature in these motions, without full argument to determine whether or not the *Election Act* takes precedence over the *Class Proceedings Act*; whether or not s. 39 of *Class Proceedings Act* would permit the petitioners to add new voters or have the current petitioners represent voters in other ridings; or whether the "individual nature" of the action under the *Election Act* is one capable of class representation.

E. The N.D.P. Issue

- 60 The N.D.P. maintain that they are not an elected candidate and that none of the remedies which appear in the Act could have any possible application to them. They maintain further that any declaration which might be granted would be one where they are in breach of the Act and that that cannot be dealt with in this action, but only under a charge for contravening the *Election Act*. They have not been prosecuted under Part 12.

- 61 It must be noted however that under s. 256(1) the phrase used is "An individual or organization must not . . .", and under s. 256(2), "An individual or organization must not . . . by fraudulent means . . . cause an individual to vote or refrain from voting". Merely because the remedy of setting aside the election would not directly affect the respondent New Democratic Party and merely because they have not been prosecuted, does not in my view preclude this court from granting a declaration in respect of its involvement if any. That again is a matter of evidence.

- 62 I would not be prepared to dismiss the respondent New Democratic Party from the proceedings at this stage.

F. Miscellaneous Items

- 63 In respect of:

- the prohibition on asking voters how they voted;
- the fact that voters must give oral evidence;
- that no election be declared invalid by reason only of an irregularity if the court is satisfied that the election was conducted in good faith and did not materially affect the result;

- whether the voters may be out of time in any event for voting in the Advance Poll.

64 These are all items which may present significant obstacles to the petitioners in their pursuit of victory. However, I am not prepared at this early stage to deprive them of the opportunity of establishing a case if they are able to do so.

65 In reference to all of the issues set forth in the motions it must never be overlooked that under our judicial system there is a fundamental right to access the courts: to advance allegations and adduce the evidence to prove them. Courts generally are most reluctant to strike out a petition or statement of claim at an early stage unless it can be clearly demonstrated that there is no chance of success at all. Provided the plaintiff's pleadings are such that they may be able to make out a case, then doubts should be resolved in their favour until they have "had their day in court".

66 The respondents' motions are dismissed and I shall leave it to the parties to establish a date to come back before me on the certification application under the *Class Proceedings Act*.

Motion dismissed.

Appendix D

[Indexed as: *Friesen v. Hammell*]

Leonard Friesen, Holly Kuzenko, Mildred Umbargen, and The Members of the Class of Persons Caused to Vote for the Candidate of a Particular Political Party in the General Provincial Election Held on the 28th Day of May, 1996, as a Result of a Violation of Section 256 of the Election Act of British Columbia, Petitioners, and Sue Hammell, Lois Boone Graeme Bowbrick, Gretchen Brewin, Pietro Calendino, John Cashore, Glen Clark, Ed Conroy, Ujjal Dosanjh, Jim Doyle, Corky Evans, Mike Farnworth, Helmut Giesbrecht, Evelyn Gillespie, Bill Goodacre, Bill Hartley, Gerard Janssen, Rick Kasper, Jenny Wai Ching Kwan, Harry Lali, Dale Lovick, Joy Macphail, Cathy McGregor, Dan Miller, Steve Orcherton, Andrew Petter, Penny Priddy, Jan Pullinger, Paul Ramsey, Fred Randall, Glenn Robertson, Joan Sawicki, Moe Sihota, Joan Smallwood, Tim Stevenson, Dennis Streifel, Ian Waddell, Erda Walsh, David Zirnhelt, and The New Democratic Party of British Columbia, Respondents

British Columbia Supreme Court

Williams C.J.S.C.

Judgment: November 4, 1997

Heard: September 29, 30 and October 1, 1997

Docket: Vancouver A962818

David Lunny, for the Petitioners.

E. David Crossin and *Susan Coristine*, for the Respondents except Dale Lovick and The New Democratic Party.

Ian D. Aikenhead, Q.C., for Dale Lovick.

John L. Finlay and *David Gruber*, for the New Democratic Party.

John Waddell, Q.C., for the Chief Electoral Officer.

Elections — Practice and procedure on controverted elections — In federal and provincial elections — Jurisdiction — Of courts — Petitioners were voters in 3 of 39 ridings in which respondent candidates for New Democratic Party were elected — Petitioners claimed respondents were elected on basis of false representations, contrary to Election Act — Petitioners applied to have proceedings certified as class action pursuant to Class Proceedings Act on basis of claim being related to voters of other 36 ridings — Election Act was scheme designed to deal with election offences — Courts were designated to adjudicate issues arising under Act — Election Act gave court jurisdiction to hear matter without interfering with Parliamentary privilege — Election Act, R.S.B.C. 1996, c. 106 — Class Proceedings Act, R.S.B.C. 1996, c. 50.

Statutes — Interpretation — Construction — Strict — Petitioners were voters in 3 of 39 ridings in which respondent candidates for New Democratic Party were elected —

Petitioners claimed respondents were elected on basis of false representations, contrary to Election Act — Petitioners applied to have proceedings certified as class action pursuant to Class Proceedings Act on basis of claim being related to voters of other 36 ridings — Right of elected candidate to take office or validity of election may not be challenged except by application under s. 150 of Election Act — Strict and literal interpretation of application procedure set out in Election Act should not be altered or abrogated by Class Proceedings Act — Legislative purpose of Class Proceedings Act did not override legislative purpose of Election Act — Class Proceedings Act did not apply to applications brought under s. 150 — Election Act, R.S.B.C. 1996, c. 106, s. 150 — Class Proceedings Act, R.S.B.C. 1996, c. 50.

Practice — Parties — Representative or class actions — General — Petitioners were voters in 3 of 39 ridings in which respondent candidates from New Democratic Party were elected — Petitioners claimed respondents were elected on basis of false representations, contrary to Election Act — Petitioners applied to have proceedings certified as class action pursuant to Class Proceedings Act on basis of claim being related to voters of other 36 ridings — One of five requirements for certification under s. 4 of Class Proceedings Act was that class action had to be preferable procedure — Preferable procedure was that each of 39 ridings was represented by separate plaintiff rather than class action — No applications were made by voters in other ridings — There was therefore no cause of action to which certification application applied — Election Act, R.S.B.C. 1996, c. 106 — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4.

Practice — Pleadings — Application to strike — General — Petitioners were voters in 3 of 39 ridings in which respondent candidates from New Democratic Party were elected — Petitioners claimed respondents were elected on basis of false representations, contrary to Election Act — Petitioners applied to have proceedings certified as class action pursuant to Class Proceedings Act on basis of claim being related to voters of other 36 ridings — Respondents applied to have petition struck for disclosing no cause of action — Petitioners were entitled under s. 256(2) of Election Act to proceed with original petition — Election Act, R.S.B.C. 1996, c. 106, s. 256(2) — Class Proceedings Act, R.S.B.C. 1996, c. 50.

Cases considered by *Williams C.J.S.C.*:

- American Pipe & Construction Co. v. Utah* (1974), 414 U.S. 538, 94 S. Ct. 756 (U.S. S.C.) — considered
- Anson v. Dyott* (1869), 1 O'M. & H. 22, (sub nom. *Lichfield Case*) 20 L.T. 11 — referred to
- Centre Wellington (County) Election Case, Re* (1879), 44 U.C.Q.B. 132, Hodg. 579 (Ont. Q.B.) — referred to
- Endean v. Canadian Red Cross Society*, 148 D.L.R. (4th) 158, 11 C.P.C. (4th) 368, 37 C.C.L.T. (2d) 242, 36 B.C.L.R. (3d) 350, [1997] 10 W.W.R. 752 (B.C. S.C.) — referred to
- Harrington v. Dow Corning Corp.*, 48 C.P.C. (3d) 28, 22 B.C.L.R. (3d) 97, [1996] 8 W.W.R. 485, 31 C.C.L.T. (2d) 48 (B.C. S.C.) — referred to
- Jackman v. Stollery* (1980), 30 O.R. (2d) 534, 116 D.L.R. (3d) 325 (Ont. H.C.) — referred to
- Lamb v. McLeod (No. 1)* (1931), [1932] 1 W.W.R. 206 (Sask. C.A.) — referred to
- Maxwell v. MLG Ventures Ltd.* (1995), 40 C.P.C. (3d) 304 (Ont. Gen. Div.) — referred to
- McLeod v. Noble* (1897), 28 O.R. 528 (Ont. Div. Ct.) — considered
- Poulin c. Casgrain*, [1950] Que. P.R. 91 (Que. S.C.) — referred to
- R. v. Clark*, [1943] O.R. 501, [1943] 3 D.L.R. 684 (Ont. C.A.) — considered

Woodward v. Sarsons (1875), 44 L.J.C.P. 293, L.R. 10 C.P. 733 (Eng. C.P.) — referred to

Statutes considered:

Class Proceedings Act, R.S.B.C. 1996, c. 50

Generally — referred to

s. 2(4) — referred to

s. 4 — considered

s. 4(1) — considered

s. 4(1)(a) — considered

s. 4(1)(d) — considered

s. 39 — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91(27) — referred to

Corrupt and Illegal Practices Prevention Act, 1871, S.B.C. 1871, c. 158

Generally — referred to

s. 4 — referred to

Election Act, R.S.B.C. 1996, c. 106

Generally — referred to

Pt. 12 — referred to

s. 99-101 — referred to

s. 102-108 — referred to

s. 109 — referred to

s. 109(8) — referred to

s. 150 — considered

ss. 150-151 — considered

s. 150(1) — considered

s. 150(2) — referred to

s. 150(3) — referred to

s. 150(3)(a) — considered

s. 150(4) — considered

s. 150(5) — referred to

s. 151 — referred to

s. 251 — referred to

s. 255 — referred to

s. 256 — considered

s. 256(2) — considered

s. 257 — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Trial of Controverted Elections Act, 1871, S.B.C. 1871, c. 167

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 5(9) — referred to

R. 19(24) — referred to

APPLICATION by petitioners to have proceedings certified as class action; APPLICATION by respondents to have petition struck.

Williams C.J.S.C.:

I: Background

- 1 This is an application by the Petitioners to have these proceedings certified as a class action pursuant to the *Class Proceedings Act* R.S.B.C. 1996, c.50.
- 2 The Petition is brought under the *Election Act* R.S.B.C. 1996, c. [106] for a declaration that the Respondents are in breach in s.256 of the *Election Act*. It seeks remedies against the Respondents on the basis that in 39 ridings where successful candidates from the New Democratic Party were elected, they were elected on the basis of false representations made in reference the state of finances in the province contrary to the *Election Act*.
- 3 The three named Petitioners are voters in the ridings of Surrey-Green Timbers, New Westminster, and Rossland-Trail. As they see it, their claims relate not only to the three ridings wherein they are voters, but also to the remaining 36 ridings by virtue of the representation scheme created under the *Class Proceedings Act*.
- 4 The Petitioners request an order that the proceedings be certified as class proceedings and that the class be
all persons who were voters in the May 28, 1996 British Columbia Provincial General Election aggrieved by a violation of Section 256 of the *Election Act* of British Columbia.

II: Preliminary Motions

- 5 On February 27, 1997 I gave Reasons for Judgment on several preliminary points raised by the Respondents in an endeavour to have the petition dismissed not only before a trial but before the application for certification as a class action was to be heard.
- 6 I dismissed those motions because I was not prepared at such an earlier stage to deprive the Petitioners of their opportunity to establish a case. I left it to the parties to set a date to come back before me on the certification application which they did on September 29, 1997.
- 7 Among the issues argued by the Respondents in their preliminary application were those of the applicability of the *Class Proceedings Act*, and whether s.39 of that statute could waive the time limits established under the *Election Act* thereby permitting either the three Petitioners or other petitioners yet to be named to claim in respect of the remaining 36 ridings.

Those issues were left undecided until the motion for certification was heard and fully argued. Arguments occupied three days.

III: Issues Before the Court in the Petition at Bar

8 This Court must determine the following three issues:

- (a) Does this Court have jurisdiction to hear a class proceedings certification Petition brought under the *Election Act*?
- (b) Can a petition under the *Election Act* be brought under the *Class Proceedings Act* and if so, how can ostensible conflicts between the statutes be reconciled?; and
- (c) If this Court does have jurisdiction to hear this Petition, should this Court certify this action under the *Class Proceedings Act*?

9 The decision will deal with each of these issues in turn, under separate headings.

IV: The Jurisdiction Argument of the Respondents

10 I shall first deal with jurisdiction though it is raised as a defence to the application because if the respondent New Democratic Party were to succeed in this regard then the matter should go no further.

11 For the reasons below, I find that the Supreme Court of British Columbia has jurisdiction to hear this Petition for certification. In view of my conclusion on the jurisdiction issue, it will not be necessary for me to hear further from Mr. Lunny on behalf of the applicants.

12 The Respondents' jurisdiction argument advanced by Mr. Finlay consists of two related parts. First, he argues that because of parliamentary privilege this Court has only that jurisdiction expressly given to it by the *Election Act* and no inherent jurisdiction. The Court therefore is a court of inferior jurisdiction supervised by the Legislative Assembly. Second, Mr. Finlay argues that the Petitioners could never establish the contravention of s.256 of the *Election Act* because "s.256 is the codification of an ancient parliamentary penal law with its own implicit limitations." He argues that the offence sections of the *Election Act* create true "crimes" and must be strictly construed and that fraudulent means should not be interpreted broadly to extend beyond the specific word contained in the original statute "abduction, duress or any fraudulent device or contrivance". He contends that "fraudulent device or contrivance is limited to trickery practiced upon specific persons making their vote an involuntary act and not an expression of their free will.

13 Relevant provisions of the *Election Act* are:**Intimidation****256.**

- (1) An individual or organization must not intimidate an individual for any of the following purposes:
 - (a) to persuade or compel an individual to vote or refrain from voting;
 - (b) to persuade or compel an individual to vote or refrain from voting for or against a particular candidate or a candidate for a particular political party;
 - (c) to punish an individual for having voted or refrained from voting as described in paragraph (a) or (b).
- (2) An individual or organization must not, by abduction, duress or fraudulent means, do any of the following:
 - (a) impede, prevent or otherwise interfere with an individual's right to vote;
 - (b) compel, persuade or otherwise cause an individual to vote or refrain from voting;
 - (c) compel, persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate or for a candidate of a particular political party.
- (3) An individual or organization prohibited from doing something by this section must not do the prohibited act directly, indirectly or by another individual or organization on behalf of the individual or organization who is subject to the prohibition.
- (4) An individual or organization who contravenes this section commits an offence and is liable to one or more of the penalties referred to in section 255(7).

Application to court**150.**

- (1) The right of an elected candidate to take office or the validity of an election may not be challenged except by an application under this section.
- (2) An application may be made in accordance with this section to the Supreme Court for a declaration regarding the right of an individual to take office or the validity of an election.
- (3) The time limit for making an application is as follows:
 - (a) if the application is on the basis that section 255, 256, 257 or 258 was contravened, 3 months after the date of the contravention or 30 days after the return of the writ for the election, whichever is later;
 - (b) in other cases, 30 days after the return of the writ for the election.

- (4) An application may be made only by a candidate in the election, the chief electoral officer or a voter for the electoral district for which the election was held.
- (5) An application may be made only on one or more of the following bases:
 - (a) that a candidate declared elected was not qualified to hold office at the time he or she was elected;
 - (b) that an election should be declared invalid because it was not conducted in accordance with this Act or a regulation under this Act;
 - (c) that an election should be declared invalid because section 255, 256, 257 or 258 was contravened...

Power of the court on an application

151.

- (1) On the hearing of an application, the court may do any of the following:
 - (a) declare that an elected candidate is qualified to take and hold office;
 - (b) declare that an elected candidate is not qualified to hold office and that the office is vacant;
 - (c) declare that an election is confirmed as valid;
 - (d) declare that an election is invalid and that the office is vacant.
- (2) The court must not declare an election invalid by reason only of an irregularity or a contravention of this Act or a regulation under this Act if the court is satisfied that
 - (a) the election was conducted in good faith and in accordance with the principles of this Act, and
 - (b) the irregularity or contravention did not materially affect the result of the election.
- (3) The court may confirm the election of a candidate in relation to which the court finds there was a contravention of section 255, 256, 257 or 258 if the court is satisfied that
 - (a) the candidate did not contravene the applicable section, and
 - (b) the contravention did not materially affect the result of the election.

(a) Parliamentary Privilege

- 14** The Parliamentary privilege argument says that jurisdiction over controverted elections is part of that privilege independent of the Crown constitutionalized in Canada by the *Constitution Act* of 1867. Judges being appointed by the Queen or the Crown are of course a separate branch of government from the legislators who are elected. This separation of powers creates a sole jurisdiction over parliamentary privilege by Parliament itself

under the common law of Parliament. Sir I. Jennings, *The Law and the Constitution*, 5th ed. (London: Hodder & Stoughton, 1959) states at 115:

[T]he law and custom of Parliament is a different branch of law, administered in different courts, the High Court of Parliament, from the common law, which is administered by the Supreme Court of Judicature. Whether it is called part of the laws of England is a matter of definition. If it is, then the laws of England deal with three kinds of rules, legislation, the case law of the courts, and the law and custom of Parliament; though the last is composed partly of legislation and conflicts with the second only in exception cases.

- 15 In Canada this matter is referred to by J. Maingot, *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982) at 161-162:

What is clear is that the ordinary civil and criminal jurisdiction of the courts does not extend to determining the rights of members to sit in the House, and the courts equally have nothing to do with questions affecting its membership except in so far as they have been specifically designated by law to act in such matters ... [emphasis added].

- 16 Jurisdiction to deal with controverted elections was totally in the hands of Parliament until 1868 when it delegated that power to the judiciary then sitting as an "election court" to try controverted elections. The *Trial of Controverted Elections Act, 1871*, S.B.C. 1871, c.167, the forerunner of the current *Election Act*, adopted this principle. Mr. Finlay argues that the *Election Act* is a complete code, that this Court sits as an inferior tribunal, and that its powers are not plenary.

- 17 In the alternative, Mr. Finlay argues that the Court must take a conservative approach to the interpretation of its jurisdiction in these circumstances and cites *Lamb v. McLeod (No. 1)* (1931), [1932] 1 W.W.R. 206 (Sask. C.A.) at 208 in support:

In acting in cases of election petitions, the Court is not exercising its ordinary civil or criminal jurisdiction. The Assembly is the guardian of its own prerogatives and privileges, and the Courts have nothing to do with questions affecting its membership except in so far as they have been specially designated by law to act in such matters ... Therefore, the Courts will always approach questions concerning their jurisdiction over election contests with great caution, as being unwilling to interfere without undoubted authority.

- 18 It is argued that Parliamentary privilege remains today as one of the underlying features of our democratic society. I agree that it is an important part of our history but its scope and influence would appear to be significantly reduced by the fact that Parliament, or in this case the Legislature of the Province of British Columbia, has by statute designated the Courts to deal with many of the matters which formerly fell under the privilege.

- 19 In s. 256 of the *Election Act* it is clear the Legislature has created an offence under the heading of "Intimidation".

- 20 Section 257 lists under the title of "Corrupt voting" some of those violations referred to by Mr. Finlay such as voting when not entitled to, voting more than once, obtaining a ballot in the name of other individuals, and other offences. Section 255 deals with "Vote buying".
- 21 Penalties in the nature of a fine of not more than \$1,000 and imprisonment for a term not longer than two years are provided in those sections after a successful prosecution in the courts which establishes that an offence has been committed. The *Act* provides under Part 12 and in particular s. 251:
- Any penalty under this Part is in addition to and not in place of any other penalty to which an individual or organization may be liable under this Act in respect of the same matter.
- 22 Subsections 151(1) to [(3)] set forth the requirements to challenge an election.
- 23 What all of this amounts to in my view is that like many other parliaments and legislatures, the British Columbia Legislature has created in the *Election Act* a scheme to deal with election offences and has designated the courts of this province to deal with and adjudicate issues which arise under it. While I agree with Mr. Finlay that the courts should adopt a conservative approach when dealing with elections offences which impact upon legislative privilege, it does not lie well in the mouth of the respondent New Democratic Party which enacted this *Election Act* and delegated the power to the Court to now argue that this Court has no jurisdiction to interfere with its Parliamentary privilege.
- 24 I would adopt the language of Mr. Maingot, above, that the Courts should not deal with questions affecting membership "except insofar as they have been specially delegated by law to act in such matters".
- 25 The *Election Act* specially designates this Court to deal with those questions where election offences are alleged and accordingly I conclude that the Court does not lack jurisdiction on the basis of Parliamentary privilege.

(b) Constitutional and statutory interpretation

- 26 I will now turn to the second half of Mr. Finlay's jurisdictional argument. Mr. Finlay contends that earlier electoral statutes put only three corrupt practices within the penal jurisdiction of the courts: bribery, treating (serving of alcohol or food) and undue influence.
- 27 He argues that with reference to "undue influence" that it was limited in scope under s.4 of the earlier *Corrupt and Illegal Practices Prevention Act, 1871*, S.B.C. 1871, c.158, to "abduction, duress or any fraudulent device or contrivance". The words in s.256 of the 1995 *Election Act*, "fraudulent

means" cannot extend to true crimes beyond those originally delegated by Parliament to the Courts. Accordingly since making promises or representations before the election, in a general sense could never have been contemplated by the original wording ("fraudulent contrivance or device") they cannot be included under "fraudulent means".

28 He argues that if "fraudulent means" were to be given a wider scope by the Court, it would amount to the creation of a "new true crime" and pursuant to the *Constitution Act, 1867* would place it beyond legislative competence of the Province of British Columbia by virtue of s.91(27), which places the enactment of criminal law exclusively with the federal power.

29 In summary, this argument says that if an election candidate in British Columbia, or an agent or political party of that candidate, knowingly makes a false statement which might affect the outcome of the election such false statement does not come within the definition of "fraudulent means" for historical reasons dating back to the *Corrupt and Illegal Practices Prevention Act* but even if it did, then such an interpretation would place the wording beyond the legislative competence of the province meaning that the allegations in the Petition could never succeed and so the claim should be dismissed.

30 As I indicated in my Reasons for Judgment on the Preliminary Motion and again at the hearing of this application, the Court should not be deciding matters at an early stage in a vacuum without the benefit of the evidence to be adduced at the trial. Whether the conduct of the Respondents amounts to "fraudulent means" within the intent of the *Election Act* is surely something that should be left until the evidence has established the nature of the conduct.

31 It is conceivable that such conduct may fall within the fraudulent contrivance and device phraseology of the predecessor statute. It is also conceivable that fraudulent means should be expanded and could be given a wider interpretation (if that is what was intended) without creating a new crime which would exceed provincial powers. But those arguments must be left for the Court to determine when all of the evidence is in.

32 Mr. Finlay says that "fraudulent means" in s.256 must be limited to its historical roots and what amounts to an absence of free will. He cites the leading case of *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733 (Eng. C.P.) at 743:

[A]n election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws [emphasis in original].

- 33 He argues that the fraudulent means must therefore be constrained to what was intended under the concept of undue influence as set forth in the *Anson v. Dyott* (1869), 1 O'M. & H. 22 at 25:

using any violence or threatening any damage, or resorting to any fraudulent contrivance to restrain the liberty of a voter so as either to compel or frighten him into voting or abstaining from voting otherwise than he freely wills [emphasis added].

- 34 This approach says that the Courts should so interpret the language in modern statutes (fraudulent means) in the context of fact patterns from centuries past. This "frozen meaning" approach to statutory interpretation is not one which I would adopt any more than the Courts have adopted the frozen rights theory in Aboriginal cases. I am not unmindful of the cautious approach in reference to the *Election Act* because of an infringement on Parliamentary privilege, but I would certainly reject this argument in concept.

- 35 I dismiss the jurisdictional arguments.

V: Conflict Between the Election Act and The Class Proceedings Act

- 36 The Petitioners argue in this application that certification should be granted not only to the three Petitioners or the three Petitioners named and 36 other Petitioners available but yet to be named as petitioners in respect of the 36 other ridings, as this would permit an identifiable segment of the voters in each of the ridings or "elections", which took place on May 28, 1996, to be included in the class seeking the remedies claimed in the Petition.
- 37 In reference to the representation of the remaining 36 ridings by the three Petitioners, Mr. Lunny argues that by virtue of s.2(4) of the *Class Proceedings Act* the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceedings only if it is necessary to do so in order to avoid a substantial injustice to the class. He argues that the injustice to the class would be like the s.4(1)(d) argument. Were such a representative not to be named then the others could not commence an action in those 36 ridings because the time stipulated under the *Election Act* had expired.
- 38 In summary then, the Petitioners ask the Court to certify the Petition as a class proceeding with the three Petitioners representing not only themselves but all other voters in the 39 ridings wherein N.D.P. candidates were elected.
- 39 The Petitioners ask in the alternative that if they are not appropriate plaintiffs to represent the remaining 36 ridings then they should be permit-

ted to name as representatives 36 other persons, one from each of those 36 ridings who voted in the May 28, 1996 elections.

- 40 In order to determine whether this Court should grant the Petition, it is first necessary to examine whether an *Election Act* grievance can be advanced through the procedural vehicle provided by the *Class Proceedings Act*. It is to this seeming conflict that I now turn.

(a) *Position of the Respondents*

- 41 Turning to the opposing arguments presented by the Respondents, Mr. Dale Lovick, the elected member from the Nanaimo riding represented by Mr. Aikenhead, and the 38 other elected members including the elected members from Surrey-Green Timbers, New Westminster and Rossland-Trail, represented by Mr. Crossin say that as a matter of statutory interpretation the *Class Proceedings Act* cannot and does not apply to applications brought under s.150 of the *Election Act* and that accordingly no certification should be granted. The respondent New Democratic Party, represented by Mr. Finlay, argues (and the Respondents referred to above also argue) in the alternative that the five conditions set out in s.4 of the *Class Proceedings Act* have not been met by the Petitioners and so the motion for certification must fail.
- 42 All Respondents support the argument primarily advanced by Mr. Crossin which says that the *Election Act* is either a code unto itself or at least a scheme to which the *Class Proceedings Act* was never intended to apply.
- 43 They emphasize that s.150 of the *Election Act* states that,
the right of an elected candidate to take office or the validity of an election may not be challenged except by application under this section [emphasis added].
- 44 The Respondents thus submit that the Petitioner may not challenge the election through another statute, the *Class Proceedings Act*.
- 45 Mr. Crossin argues that by virtue of these sections and because elections must be challenged without delay, the Legislature cannot have intended the *Class Proceedings Act* to apply and the two pieces of legislation cannot stand together. The *Class Proceedings Act* cannot override or frustrate the objections of the *Election Act* — the two are in total conflict.
- 46 The Respondents alternatively submit that the geographical and temporal limitations should be strictly construed so as not to do violence to the legislative intent and policy underlying the *Election Act*. Mr. Waddell, counsel for the Chief Electoral Officer, submits that these values are the finality of the election results and the stability of the membership of the House.

(b) Position of the Petitioners

47 The Petitioners see no conflict between the *Election Act* and the *Class Proceedings Act*. They say that the *Election Act* is concerned with the holding of elections generally and the procedures to be followed generally in order to contravert an election. They deny that the *Election Act* is a complete code or that s.150(4) requires a voter to make the application personally. They argue that the *Election Act* is no different from any other statute over which the *Class Proceedings Act* will govern, and will serve to abate limitation periods once certification has been granted.

48 The Petitioners further submit that an application of principles of statutory interpretation should prompt the Court to adopt the interpretation that avoids conflict, as it is assumed that the Legislature would strive to be consistent.

(c) The application of the Class Proceedings Act where it conflicts with an originating statute

49 An important question to be determined at this certification hearing is whether the provisions of the *Election Act* or the *Class Proceedings Act* will prevail, or alternatively, whether they can be reconciled. The *Election Act* imposes procedural, temporal and geographical limitations on a complaint under section 150. Subsection 150(1) imposes a procedural limitation on complaints brought under the *Act*:

The right of an elected candidate to take office or the validity of an election may not be challenged except by application under this section.

50 Paragraph 150(3)(a) imposes a time limitation on complaints brought under the *Act*:

if the application is on the basis that section 255, 256, 257, or 258 was contravened, 3 months after the date of the contravention or 30 days after the return of the writ for the election, whichever is later.

51 Subsection 150(4) imposes a geographical limitation on complaints brought under the *Act*:

[A]n application may be made only by a candidate in the election, the chief electoral officer or a voter for the electoral district for which the election was held.

52 Given the relative infancy of Canadian legislation, it is not surprising that no domestic cases offer guidance on this issue. Most class proceedings have been based in the common law, where certification raises no conflict with a legislative scheme. Some Canadian class actions have been, like the Petition at bar, grounded in statute — see, for example *Maxwell v. MLG Ventures Ltd.* (1995), 40 C.P.C. (3d) 304 (Ont. Gen. Div.), based in the

Ontario *Securities Act*, R.S.O. 1990, c.S.5. In *Maxwell*, however, no conflict arose between the class proceedings legislation and the originating statute, and thus it was not necessary for the Court to explore the issue.

- 53 The more diverse American class action jurisprudence provides one example germane to the immediate enquiry. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756 (U.S. S.C. 1974), the United States Supreme Court examined the interplay of class action legislation and statutory provisions, in the context of a failed antitrust class action. The relevant class action legislation, which suspended relevant limitation periods during the pendency of a class action, stood in conflict with the relevant enabling statute, which imposed a time limitation. The Supreme Court concluded that the limitation period had been suspended during the pendency of the certification, and that the individual members could launch individual suits. The Court cautioned, however, that there would be no general rule that a class proceeding will always trump a statutorily-imposed limitation period. Instead, a court must examine the legislation purpose underlying the limitation period:

The proper test is not whether a time limitation is "substantive" or "procedural," but whether tolling the limitation in a given context is consonant with the legislative scheme [at 729].

- 54 With this *American Pipe* principle in mind, we must examine whether the temporal, geographical, and procedural limitations imposed by the *Election Act* are strict and absolute, or whether they may be suspended by other limitations in class proceedings.

(d) Personal and specific nature of the Election Act

- 55 The *Election Act* takes pains to emphasize that its procedures and rights are personal. One person may not vote for another. In the case of alternative (ss.102–108) or absentee (ss.99–101) voting, the voter may not send a personal representative to vote in his or her name, but must use alternative personal means such a mail-in ballot. This stands in contrast to the Ontario and Federal statutes which permit proxy voting in certain limited circumstances. Subsection 109 permits a person to accompany and assist a voter for whom the physical act of voting is difficult. Subsection 109(8), however, emphasizes that "an individual does not vote by assisting under this section." There is no process of "representative voting" in the British Columbia *Election Act*. Nor is there an explicit or implicit means for "representative grieving" in the *Act*.

(e) Strict interpretation of electoral statutes

- 56 In *McLeod v. Noble* (1897), 28 O.R. 528 (Ont. Div. Ct.) at 544-545 the Court examined whether the High Court of Justice had jurisdiction to issue an injunction staying a judicial recount. In examining the interplay between rules of civil litigation and statutes establishing electoral grievance procedural, the case is especially germane to the immediate enquiry:

In the selection of members the Dominion statutes provide for the determination of election controversies by recount and petition in a simple, speedy and adequate manner; much more convenient and expeditious, and much more likely to produce impartial results than the superseded methods of the Parliamentary Committee. Now, any interference by way of injunction with the time limits fixed for the recount (for example) would disarrange the whole scheme of the Act. It would mean the introduction of the rules practice and procedure and the consequent delays of civil litigation which are inapt when applied to political officers acting under statutory powers within prescribed limits of time.

- 57 Similarly, in *R. v. Clark*, [1943] O.R. 501 (Ont. C.A.) at 522, Laidlaw J.A. stated:

The Legislature has surrendered part of its jurisdiction by Acts relating to controverted elections. But those Acts must be construed strictly and literally. They do not take away from the Legislative Assembly all power to deal with matters pertaining to election of its members [emphasis added].

- 58 Similar admonitions to a cautious and conservative approach to interpreting elections legislation are found in *Lamb v. McLeod* (No. 1) (1931), [1932] 1 W.W.R. 206 (Sask. C.A.) at 208; *Re Centre Wellington (County) Election Case* (1879), 44 U.C.Q.B. 132 (Ont. Q.B.) at 145; *Jackman v. Stollery* (1980), 116 D.L.R. (3d) 325 (Ont. H.C.) at 331, and *Poulin c. Casgrain*, [1950] Que. P.R. 91 (Que. S.C.).

(f) Conclusion: conflicts between the two statutes

- 59 In my Decision of February 27, 1997, I stated, in reference to the Rule 5(9) submissions that it could not have been the legislative intention to allow one voter to start an action in one riding and then months or even years later decide to add the other voters or the same voter as their representative for actions in each of the other districts [at para.37]. At that time I declined to decide at the Motion to Dismiss the issue of how this would affect the overall representative action enquiry, and preferred to wait until the certification hearing [at para. 59]. The Petitioners have not convinced me that the legislative purpose of the *Class Proceedings Act* should trump the legislative purpose, expressly stated through the limitations of the *Election Act*.
- 60 The *Class Proceedings Act* cannot override the constitutionally protected right of the legislature to adjudicate the outcome of elections or, alternatively, to design and delegate means of adjudicating elections to the

Supreme Court. In the present enquiry, "strict and literal" scrutiny of the specific geographical and temporal limitations explicitly established in ss. 150–151 of the *Election Act* indicates that they should not be abrogated or altered through the interposition of the *Class Proceedings Act*. It remains a question whether the substantive claim advanced by the Petitioners can survive "strict and literal" scrutiny. But that is a question for trial, and I specifically make no finding on this issue today.

- 61 I have already recognized that the *Election Act* does raise special considerations by virtue of the history Parliamentary privilege and that it is unique and distinguishable from many other statutes for that reason. I would go further and say that while the cases such as *Endean v. Canadian Red Cross Society* (22 May 1997), Vancouver C965349 (S.C.) [reported 148 D.L.R. (4th) 158 (B.C. S.C.)]; *Harrington v. Dow Corning Corp.* (1996), 48 C.P.C. (3d) 28 (B.C. S.C.) and others have given a generous and broad interpretation to the *Class Proceedings Act*, that concept with which I have no general disagreement must be looked at somewhat differently in reference to the *Election Act* and in particular the extent to which Parliamentary privilege has been delegated. In my view, the *Act* means what it says and my discretion, as I see it, is one of strict interpretation in reference to the *Election Act*.
- 62 I am not persuaded, as argued by the Respondents, that the statutes are in total conflict or that the *Class Proceedings Act* could never apply to a Petition brought under the *Election Act*. However, the strict wording and jurisprudence of the *Election Act* and analogous legislation blocks the liberal interpretation urged by the Petitioners in the immediate case.
- 63 I shall now turn to the *Class Proceedings Act* and examine how these principles apply to the facts of this case under the *Election Act*.

VI: Certification

(a) *The test for certification in the Class Proceedings Act*

- 64 Section 4 of the *Class Proceedings Act* establishes the test for certification and sets forth five requirements:
- 4.(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if
 - (a) the pleadings disclose a cause of action,
 - (b) there is an identifiable class of 2 or more persons,
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members,

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues an interest that is in conflict with the interests of the other class members.

(b) Position of the Petitioners

- 65 It is the position of the Petitioners that all five of these requirements have been met. With particular reference to (a), the cause of action issue, they say that I have already dealt with it in my earlier reasons. In reference to (d), the preferable procedure, they say it is the preferable procedure as they would be prejudiced if they were not permitted to proceed.

(c) Position of the Respondents

- 66 It is the position of the Respondents that the Petitioners have satisfied none of the criteria required by s.4 of the *Class Proceedings Act*. In particular, they argue that the Petitioners have no cause of action because they lack standing against 36 of the 39 named M.L.A.s., and that "fraudulent means" cannot include the offences alleged. The Respondents further argue that a class proceeding would not be a preferable procedure, as an individual may file a grievance under s.150 of the *Election Act*. Finally, they argue that the Petitioners could not be representative plaintiffs because of the inadequacy of the materials filed.

4(1)(d)

- 67 The Petitioners claim that I should certify the class proceeding as the preferable procedure because the remaining 36 ridings could not be included in the class unless certification were granted. That of course is because actions have not been commenced in those 36 ridings. In effect the Petitioners claim that because voters failed to come forth within the 36 ridings to commence an action, within the statutorily prescribed time limit, the *Class Proceedings Act* is now the preferable procedure since time limits can be suspended. That argument sounds to me like a classic "bootstrap" argument and one which in my view cannot succeed. The action could well have gone forth as 39 separate actions consolidated for trial or with 39 plaintiffs

instead of three in this action had they commenced their action in time. In my view the Petitioners have failed to establish that the *Class Proceedings Act* is the preferable procedure in this case.

4(1)(a)

- 68 There can only be a cause of action under the *Election Act* if a voter in a particular electoral district makes an application within 30 days. That was not done in the remaining 36 ridings and it is the only way the validity of election in a riding can be challenged. Since no application was made by a voter in those 36 ridings there is in my view no cause of action to which a certification application could apply. Unlike the product liability cases, where a cause of action does exist for a number of people but became time-expired for some of them, no cause of action ever did arise in the case at bar since no voter in those 36 electoral districts applied under the *Election Act*.

VII: Conclusion and Orders

(a) *The Petition for certification*

- 69 I have concluded that the application for certification must be dismissed. In view of my findings in respect of the jurisdiction and statutory interpretation arguments, however, the three Petitioners are at liberty to pursue their cause in respect of the Respondents against whom they have a remaining cause of action.

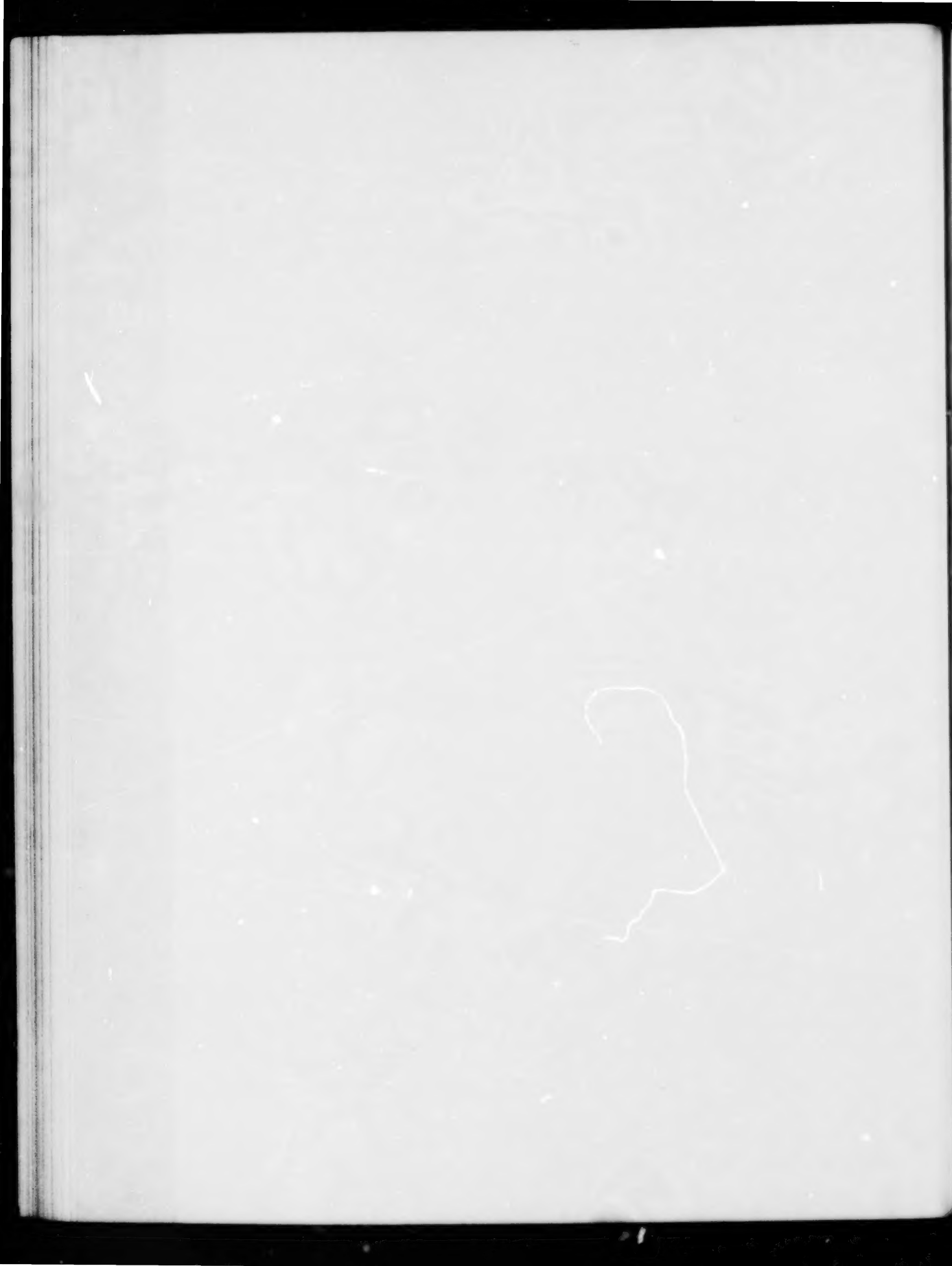
(b) *The Respondents' Rule 19(24) applications to have the pleadings struck out*

- 70 All three Respondents have also brought a fresh motion under Rule 19(24), requesting that the Court strike out the Petition as against the Respondents as it discloses no cause of action.
- 71 In a further 19(24) submission, Mr. Finlay argues that no case could lie against the New Democratic Party since no remedy is sought. I reject that argument. The Petitioners are clearly entitled under the wording of s.256(2) of the *Election Act* — which makes reference to “an individual or organization” — to apply to this Court for a declaration. Such a declaration may impact upon the remedies the Petitioners seek against other defendants, as according to their allegations, the New Democratic Party served as the agent or organization that caused or contributed to the making of the knowingly false statements.
- 72 In light of this decision, it would seem to me that several of the Respondents, including as I have already held, the New Democratic Party, must

remain as Respondents in the cause. However, in respect of the motions by Messrs. Aikenhead and Crossin, some of the Respondents they represent should no longer be required to remain as Respondents. Those persons are entitled to have the Petition struck out as against them. Unfortunately, I have neither evidence nor submissions in light of this decision to make a proper determination on those motions. Accordingly I would ask counsel to arrange to have this matter brought back before me as soon as possible so the motions by Messrs. Aikenhead and Crossin may be properly disposed of.

Applications dismissed.

Appendix E



[Indexed as: **Friesen v. Hammell**]

Leonard Friesen, Holly Kuzenko, Mildred Umbargen, and the
Members of the Class of Persons Caused to Vote for the
Candidate of a Particular Political Party in the General Provincial
Election Held on the 28th Day of May, 1996, as a Result of a
Violation of Section 256 of the Election Act of British Columbia,
Petitioners and Sue Hammell, Lois Boone, Graeme Bowbrick,
Gretchen Brewin, Pietro Calendino, John Cashore, Glen Clark, Ed
Conroy, Ujjal Dosanjh, Jim Doyle, Corky Evans, Mike Farnworth,
Helmut Giesbrecht, Evelyn Gillespie, Bill Goodacre, Bill Hartley,
Gerard Janssen, Rick Kasper, Jenny Wai Ching Kwan, Harry Lali,
Dale Lovick, Joy Macphail, Cathy McGregor, Dan Miller, Steve
Orcherton, Andrew Petter, Penny Priddy, Jan Pullinger, Paul
Ramsey, Fred Randall, Glenn Robertson, Joan Sawicki, Moe
Sihota, Joan Smallwood, Tim Stevenson, Dennis Streifel, Ian
Waddell, Erda Walsh, David Zirnheld, and The New Democratic
Party of British Columbia, Respondents

British Columbia Supreme Court

Williams C.J.S.C.

Heard: December 3, 1997

Judgment: December 18, 1997

Docket: Vancouver A962818

David Lunny and Julian Dawson, for the Petitioners.

E. David Crossin and Susan Coristine, for the Respondents except Dale
Lovick and The New Democratic Party.

Ian D. Aikenhead, Q.C., for Dale Lovick.

John Waddell, Q.C., for the Chief Electoral Officer.

Practice — Parties — Representative or class actions — General — Petitioners unsuccessfully applied to have proceedings certified as class action — Application by respondents to have petition struck was granted — Petitioners were entitled to proceed on individual basis — Petitioners' further application for declaration that election invalid was dismissed — Statutory mechanism existed to address grievance on individual basis — Petition was dismissed against all respondents except individual M.L.A.s of three petitioners — Election Act, R.S.B.C. 1996, c. 106, ss. 150, 151, 256.

The petitioners were voters in three of 39 ridings in which the respondent candidates for the New Democratic Party were elected. The petitioners claimed that the respondents were elected on the basis of false representations contrary to the *Election Act*. The petitioners applied to have the proceedings certified as a class action pursuant to the *Class Proceedings Act*. The application by the respondents to have the petition struck was granted as the three named petitioners lacked standing to launch a claim on behalf of others. The named plaintiffs were permitted to proceed with their action against their individual M.L.A.s. The plaintiffs were granted the right to bring a further application with respect to their ability to maintain an action against the remaining respondents.

Held: The application was dismissed.

The right to bring proceedings to declare an election invalid is provided solely within the *Election Act*. While s. 256 of the *Act* provided for the prosecution of electoral offenses against an array of individuals or organizations with the approval of the chief electoral officer, it did not grant jurisdiction to the court to include under ss. 150 and 151 anything more than a remedy against an elected member of the Legislative Assembly by a voter in that electoral district. Although the court had a general discretion to grant declarations, the court was not entitled to grant declaratory relief where a statutory mechanism existed to address the grievance, where the possibility of criminal consequences existed or where the declaration sought addressed a past wrong rather than a present right. It was inappropriate to allow a declaratory action against the New Democratic Party. The petition was dismissed against all respondents save and except the three individual M.L.A.s.

Cases considered by Williams C.J.S.C.:

Architectural Institute (British Columbia) v. Lee's Design & Engineering Ltd. (1979), 96 D.L.R. (3d) 385 (B.C. S.C.) — considered

Hugh W. Simmons Ltd. v. Foster, [1955] S.C.R. 324, [1955] 2 D.L.R. 433 (S.C.C.) — considered

Rabbitt v. Craigmont Mines Ltd. (1963), 42 W.W.R. 157 (B.C. S.C.) — considered

Statutes considered:

Election Act, R.S.B.C. 1996, c. 106

Generally — considered

Pt. 8 — considered

Pt. 12 — considered

s. 150 — considered

s. 150(1) — considered

s. 150(4) — considered

s. 151 — considered

s. 151(1) — considered

s. 252 — considered

- s. 253 — considered
- s. 255(7) — considered
- s. 256 — considered

APPLICATION by petitioners for declaration that election was invalid.

Williams C.J.S.C.:

- 1 On November 4, 1997 I dismissed the petitioners' application to certify a class proceeding on behalf of "all persons who were voters in the May 28, 1996 British Columbia Provincial General Election aggrieved by a violation of Section 256 of the *Election Act* of British Columbia". Essentially, the three named petitioners lacked standing to launch a claim on behalf of others. The three named plaintiffs were permitted to contrive their action against their individual M.L.A.s, the respondents Hammell, Conroy and Bowbrick.
- 2 At the same time I indicated that the petitioners could maintain their action for a declaration against the New Democratic Party, but with respect to all remaining respondents, I would have to hear from the parties further.
- 3 The further application was brought on December 3, 1997 at which time counsel for all parties except the New Democratic Party were present, either in person or by telephone. The New Democratic Party was not represented at this particular hearing because of my indication that they would remain as parties in the proceedings. That indication must now be revisited in light of the submissions made by counsel and my own research.
- 4 As had earlier been observed, this is a unique and somewhat complex case since the right to bring proceedings before the Supreme Court of British Columbia to declare an election invalid is provided solely within the *Election Act* itself. It is not a matter of common law.
- 5 Under Part 12 of the *Election Act* "Offenses", s.252 provides for prosecution of offenses and says *inter alia* that prosecution may not be commenced without the approval of the Chief Electoral Officer. That restriction would appear to cover all offenses under Part 12. Section 253 broadens the scope of prosecution to include agents, directors and organizations (that would certainly include the New Democratic Party and respondents Clark and Petter).
- 6 Section 255(7), establishes the potential penalties under Part 12:
 - (7) An individual or organization who contravenes this section commits an offence and is liable to one or more of the following penalties:
 - (a) a fine of not more than \$10000;
 - (b) imprisonment for a term not longer than 2 years;

- (c) a prohibition for a period of not longer than 7 years from holding office as a member of the Legislative Assembly;
- (d) a prohibition for a period of not longer than 7 years from voting in an election for a member of the Legislative Assembly.

7 Section 256 is the key section under which individuals or organizations are included. This section prohibits an "individual or organization" from using "fraudulent means" to "persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate" or political party.

8 If s.256 were the section which invokes the jurisdiction of the Supreme Court of British Columbia then of course the New Democratic Party, Messrs. Clark and Petter, would be included and should therefore have their names continue in the action. As earlier stated, however, Part 12 appears to be limited to offenses against the *Act* which may only be prosecuted with the approval of the Chief Electoral Officer. The Chief Electoral Officer has the jurisdiction to approve a charge against the New Democratic Party and Messrs. Clark and Petter but the question remains whether this Court has the Jurisdiction to permit those names to continue in the petition which is launched under Part 8 of the *Act*. Part 8, s.150 has been set forth in previous Reasons for Judgment in this case and will not now be fully set forth. The relevant sections read:

Section 150(1):

- (1) The right of an elected candidate to take office or the validity of an election may not be challenged except by an application under this section.
- (4) An application may be made only by a candidate in the election, the chief electoral officer or a voter for the electoral district for which the election was held.

9 Section 151 reads:

- (1) On the hearing of an application, the court may do any of the following:
 - (a) declare that an elected candidate is qualified to take and hold office;
 - (b) declare that an elected candidate is not qualified to hold office and that the office is vacant;
 - (c) declare that an election is confirmed as valid;
 - (d) declare that an election is invalid and that the office is vacant.

...

[emphasis added]

10 It will be noted that nothing under s.150 or s.151, the sole basis of the Court's jurisdiction under this *Act*, makes reference to a finding against

anyone other than the candidate who was successfully elected. It is clear from those sections that evidence may be adduced with respect to the conduct of other organizations or individuals such as the New Democratic Party and Messrs. Clark and Petter but nothing in those sections provides a cause of action against them. It would appear that s.150 is designed to give the jurisdiction to the court solely to set aside the election (defined as each electoral district) of the candidate within that district.

- 11 In summary, while the statute makes provision for prosecution of electoral offenses against an array of individuals or organizations with the approval of the Chief Electoral Officer, it does not grant jurisdiction to this Court to include under the Invalid Election provisions (Part 8) anything more than the remedy against an elected member of the Legislative Assembly by a voter in that electoral district.
- 12 Of course, courts have a general jurisdiction and discretion to grant declarations. The authorities indicate however, that this discretion should be exercised with great caution: *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 (S.C.C.) at 331. Three further principles indicate that this Court should not grant declaratory relief where statutory mechanism already exist to address the grievance: *Rabbitt v. Craigmont Mines Ltd.* (1963), 42 W.W.R. 157 (B.C. S.C.) at 159-160 and *Architectural Institute (British Columbia) v. Lee's Design & Engineering Ltd.* (1979), 96 D.L.R. (3d) 385 (B.C. S.C.) at 430. Here, the *Act* clearly provides a vehicle to address election offenses, in the office of the Chief Electoral Officer. Second, a court should not grant declaratory relief where there exists the possibility of criminal consequence: *Rabbitt, supra* at 160. Third, a declaration must be that of a present right rather than a past wrong, as the petitioners now seek: *Architectural Institute, supra*, at 430.
- 13 It would appear that the statutory scheme under s.256 of the *Election Act* is to provide a mechanism for the prosecution of electoral offenses with the approval of the Chief Electoral Officer. The Chief Electoral Officer has a solemn and serious obligation to be impartial and fair in exercising judgment as to whether or not to permit a prosecution but the final decision is left in the hands of that officer. With that mechanism in place and because of an absence of any indication that the Court's jurisdiction should be broadened from what is provided under ss.150 and 151, I have concluded that it would be quite inappropriate for me to exercise my jurisdiction to allow a declaratory action against the New Democratic Party or Messrs. Clark or Petter in these circumstances.
- 14 Since both parties have agreed that the petition should not proceed against the remaining respondents, the petition must be dismissed against

all respondents save and except respondents, Hammell, Conroy and Bowbrick.

Application dismissed.

Appendix F

[Indexed as: Friesen v. Hammell]

Leonard Friesen, Holly Kuzenko and Mildred Umbargen,
Petitioners (Respondents) and Sue Hammell, Graeme Bowbrick
and Ed Conroy, Respondents (Appellants)

Leonard Friesen, Holly Kuzenko and Mildred Umbargen,
Petitioners (Appellants) and Glen Clark, Andrew Petter and The
New Democratic Party of British Columbia, Respondents
(Respondents)

British Columbia Court of Appeal

Cumming, Prowse, Braidwood JJ.A.

Heard: December 1-2, 1998

Judgment: January 20, 1999

Docket: Vancouver CA023974, CA024147

E.D. Crossin, Q.C. and S.M. Coristine, for the Appellants Sue Hammell and Graeme Bowbrick, and the Respondents Glen Clark and Andrew Petter.

J.L. Finlay and D.E. Gruber, for the Appellant Ed Conroy and the Respondent New Democratic Party.

D. Lunny and J.A. Dawson, for the Petitioners/Respondents (CA023974) and Appellants (CA024147).

Practice — Parties — Representative or class actions — General — Petitioners unsuccessfully applied to have proceedings certified as class action — Application by respondents to have petition struck was granted — Petitioners were entitled to proceed on individual basis — Statutory mechanism existed to address grievance on individual basis — Petition was dismissed against all respondents except individual M.L.A.s of three petitioners — M.L.A.s brought application for order dismissing petition against them — Application dismissed — M.L.A.s' appeal was dismissed — Petitioners brought appeal against order dismissing their petition against premier and party — Petitioners' appeal was dismissed — Electoral candidates and political parties must not fraudulently mislead public with respect to material issues which could reasonably be expected to affect their decision for whom to vote — Petition against M.L.A.s ordered to proceed to trial — Court had no jurisdiction to grant declaratory relief claimed by petitioners — Election Act, R.S.B.C. 1996, c. 106, ss. 150, 151, 256, 256(2)(c).

Elections — Legislation — Election Acts — Petitioners unsuccessfully applied to have proceedings certified as class action — Application by respondents to have petition struck was granted — Petitioners were entitled to proceed on individual basis — Statutory mechanism existed to address grievance on individual basis — Petition was dismissed against all respondents except individual M.L.A.s of three petitioners — M.L.A.s brought application for order dismissing petition against them — Application dismissed — M.L.A.s' appeal was dismissed — Petitioners brought appeal against order dismissing their petition against pre-

mier and party — Petitioners' appeal was dismissed — Electoral candidates and political parties must not fraudulently mislead public with respect to material issues which could reasonably be expected to affect their decision for whom to vote — Petition against M.L.A.s ordered to proceed to trial — Court had no jurisdiction to grant declaratory relief claimed by petitioners — Election Act, R.S.B.C. 1996, c. 106, ss. 150, 151, 256.

Elections — Practice and procedure on controverted elections — In federal and provincial elections — Appeals — Jurisdiction — Petitioners unsuccessfully applied to have proceedings certified as class action — Application by respondents to have petition struck was granted — Petitioners were entitled to proceed on individual basis — Statutory mechanism existed to address grievance on individual basis — Petition was dismissed against all respondents except individual M.L.A.s of three petitioners — Petitioners brought appeal against order dismissing their petition against premier and party — Appeal was dismissed — Court had no jurisdiction to grant declaratory relief claimed by petitioners — Election Act, R.S.B.C. 1996, c. 106, ss. 150, 151, 256.

The petitioners were voters in three of 39 ridings in which the respondent candidates for the New Democratic Party were elected. The petitioners claimed that the respondents were elected on the basis of false representations contrary to the *Election Act*. The petitioners applied to have the proceedings certified as a class action pursuant to the *Class Proceedings Act*. The application by the respondents to have the petition struck was granted as the three named petitioners lacked standing to launch a claim on behalf of others. The named plaintiffs were permitted to proceed with their action against their individual M.L.A.s. The plaintiffs were granted the right to bring a further application with respect to their ability to maintain an action against the remaining respondents. The application was dismissed. The petitioners appealed the dismissal of their petition against the premier and the party. The individual M.L.A.s cross-appealed the dismissal of their application to have the petition against them dismissed.

Held: The appeal was dismissed. The cross-appeal was dismissed.

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The primary object of provisions such as s. 256 of the *Election Act* is to maintain and enhance the integrity of the electoral process. In enacting s. 256, the legislature intended to safeguard the public from fraudulent conduct on the part of, or on behalf of, a candidate or a political party, which was of sufficient import that it influenced the judgment of potential voters by causing them to vote other than they would have but for the fraudulent conduct. Electoral candidates and political parties must not fraudulently mislead the public with respect to material issues which could reasonably be expected to affect their decision for whom to vote.

The type of misrepresentations which would fall under "fraudulent means" within the meaning of s. 256(2)(c) would be misrepresentations of material fact which were intended to, and did, lead voters to vote for a candidate or party for whom the voter would not otherwise have voted, and which were made by a candidate or political party knowing that they were false, or without regard to their truth or falsity. Statements of intention or belief would not constitute fraudulent means within the meaning of s. 256. The trial judge's conclusion that the petition against the M.L.A.s should proceed to trial was correct.

Freedom of speech is not diminished by an interpretation of s. 256 which penalizes fraudulent misrepresentations concerning material facts which go to the heart of the voter's decision for whom to vote.

There is no provision in the *Act* for granting declaratory relief of the kind sought by the petitioners. The *Act* is a code and the court, therefore, does not have any residual inherent jurisdiction to grant declaratory relief beyond that set out in the *Act*. The appeal of the petitioners was dismissed on the basis that the court has no jurisdiction to grant the declaratory relief claimed by them.

Cases considered:

- Cameron v. Becker* (1995), 64 S.A.S.R. 238 (Australia Full Ct.) — applied
Evans v. Chrichton-Browne, [1980] 147 C.L.R. 169 (Australia H.C.) — considered
Harvey v. New Brunswick (Attorney General), (sub nom. *Harvey v. Nouveau-Brunswick (Procureur-général)*) 137 D.L.R. (4th) 142, 201 N.R. 1, 37 C.R.R. (2d) 189, [1996] 2 S.C.R. 876, 178 N.B.R. (2d) 161, 454 A.P.R. 161 (S.C.C.) — considered
Kourtesis v. Minister of National Revenue, 93 D.T.C. 5137, 153 N.R. 1, [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456, 81 C.C.C. (3d) 286, 78 B.C.L.R. (2d) 257, 14 C.R.R. (2d) 193, 27 B.C.A.C. 81, 45 W.A.C. 81, [1993] 4 W.W.R. 225, 20 C.R. (4th) 104, [1993] 1 C.T.C. 301 (S.C.C.) — referred to
R. v. Morgentaler, 157 N.R. 97, 125 N.S.R. (2d) 81, 349 A.P.R. 81, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179 (S.C.C.) — considered
R. v. Rowe, [1992] 4 All E.R. 821, [1992] 1 W.L.R. 1059, 90 L.G.R. 341 (Eng. C.A.) — considered
Rizzo & Rizzo Shoes Ltd., Re, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — applied
Smith v. Oldham (1912), 15 C.L.R. 355 (Australia H.C.) — applied
Solosky v. Canada (1979), (sub nom. *Solosky v. R.*) [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495 (S.C.C.) — referred to

Statutes considered:

- Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11
 Generally — referred to
 s. 1 — referred to
 s. 3 — referred to
Class Proceedings Act, R.S.B.C. 1996, c. 50
 Generally — referred to
Constitution Act, 1934, S.A. 1934
 Generally — referred to
Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11
 s. 91(27) — referred to
Corrupt and Illegal Practices Act, S.B.C. 1871, c. 158
 Generally — referred to
Corrupt Practices Prevention Act, 1854 (17 & 18 Vict.), c. 102
 Generally — considered
 s. V — considered
Election Act, R.S.B.C. 1979, c. 103
 s. 1 "corrupt practice" — considered
 s. 165 — considered

Election Act, R.S.B.C. 1996, c. 106

- Generally — referred to
- Pt. 8 — considered
- Pt. 12 — referred to
- ss. 150-153 — considered
- s. 150 — considered
- s. 150(1) — considered
- s. 150(2) — considered
- s. 150(3) — referred to
- s. 150(4) — considered
- s. 150(5) — considered
- s. 151 — considered
- s. 151(1)(d) — considered
- s. 151(2) — considered
- s. 151(3) — considered
- s. 153 — referred to
- ss. 251-267 — referred to
- s. 255(7) — referred to
- s. 256 — considered
- s. 256(2) — considered
- s. 256(2)(a) — considered
- s. 256(2)(b) — considered
- s. 256(2)(c) — considered

Elections Act, R.S.N.B. 1973, c. E-3

- s. 111(1) — referred to
- s. 119 — referred to
- s. 119(c) — referred to

Electoral Act, S.A. 1985

- Generally — referred to

Parliamentary Elections Act, 1868 (31 & 32 Vict.), c. 125

- Generally — considered

Provincial Elections Act, R.S.B.C. 1897, c. 67

- Generally — considered

Recall and Initiative Act, R.S.B.C. 1996, c. 398

- Generally — referred to

Representation of the People Act, 1983, c. 2

- Generally — referred to
- s. 115(2) — referred to
- s. 115(2)(b) — considered

Trial of Controverted Elections Act, 1871, S.B.C. 1871, c. 167

- Generally — referred to

Rules considered:*Rules of Court*, 1990, B.C. Reg. 221/90

- R. 5(22) — considered
- R. 19(24) — referred to

APPEAL by petitioners from judgment reported at (1997), 15 C.P.C. (4th) 301, 45 B.C.L.R. (3d) 319, 4 Admin. L.R. (3d) 115 (B.C. S.C.) dismissing petition against defendant premier

and political party; CROSS-APPEAL by defendant M.L.A.s from judgment reported at (1997), 15 C.P.C. (4th) 301, 45 B.C.L.R. (3d) 319, 4 Admin. L.R. (3d) 115 (B.C. S.C.) dismissing their application to have the petition against them dismissed.

Per Curiam:

Introduction

- ¹ On August 27, 1996, Leonard Friesen, Holly Kuzenko and Mildred Umbargen (the "petitioners") filed a petition in the Supreme Court (later amended) seeking an order pursuant to s. 150 of the *Election Act*, R.S.B.C. 1996, c. 106 (the "Act"), declaring that the elections of 39 New Democratic Party Members of the Legislative Assembly were invalid, and their offices vacant, by virtue of breaches of s. 256 of the Act. The petitioners also sought an order pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, certifying the proceeding as a class proceeding.
- ² The petition alleges that the respondents, the New Democratic Party (the "NDP") and 39 NDP Members of the Legislative Assembly (the "MLAs"), made false representations concerning the state of the 1995-96 and 1996-97 fiscal budgets and the Government's ability to offer a capital development programme, knowing that these representations were false, or without regard to whether they were false, and thereby fraudulently caused or induced members of the electorate to vote for NDP candidates. The petition also alleges that the MLAs and the NDP concealed the information necessary to ascertain the truth of these representations.
- ³ The respondents applied pursuant to Rule 19(24) of the *Rules of Court* to have the petition struck as disclosing no cause of action within the court's jurisdiction.
- ⁴ On February 27, 1997, Chief Justice Williams ("the chambers judge") dismissed the respondents' applications pursuant to Rule 19(24), with liberty to reapply.
- ⁵ The petitioners' application for certification of a class proceeding and the respondents' renewed applications pursuant to Rule 19(24) came back before the chambers judge on September 29, 1997. Thereafter, on November 4, 1997, the chambers judge dismissed the petitioners' application for certification of a class proceeding, and the application of the NDP under Rule 19(24). He adjourned the Rule 19(24) application in relation to the MLAs.
- ⁶ On December 18, 1997, following further submissions, the chambers judge dismissed the petition against all of the respondents except Hammell, Bowbrick and Conroy. At that time, he also reconsidered his earlier deci-

sion and dismissed the petition against the NDP, Premier Clark ("Clark") and Andrew Petter ("Petter").

Nature of Appeal

- 7 Hammell, Bowbrick and Conroy are appealing from the order of the chambers judge dismissing their application under Rule 19(24) to have the petition against them dismissed. On April 21, 1998 they were granted leave to appeal and the order of the chambers judge was stayed pending appeal.
- 8 Friesen, Kuzenko and Umbargen are appealing from the order of the chambers judge dismissing their petition against Clark, Petter and the NDP.
- 9 On June 23, 1998, Mr. Justice Donald ordered that the two appeals be heard at the same time.
- 10 As a matter of convenience, we will refer to the appeal of Hammell, Bowbrick and Conroy as the "MLA appeal", and to the appeal of Friesen, Kuzenko and Umbargen as the "petitioners' appeal".

Issues

- 11 The primary issue on both appeals concerns the interpretation of s. 256 of the Act. Counsel for Mr. Conroy frames this issue as one of jurisdiction. In essence, the issue is whether fraud of the nature alleged in the petition constitutes "fraudulent means" within the meaning of s. 256(2)(c) of the Act.
- 12 A separate issue which arises in the petitioners' appeal is whether the Supreme Court has jurisdiction to grant the declaratory relief claimed against Clark, Petter and the NDP.
- 13 No appeal was taken from the order dismissing the petitioners' application for certification of a class action.
- 14 None of the parties challenges the constitutional validity of s. 256 of the Act.

Reasons of the Chambers Judge

- 15 In dismissing the MLAs' application under Rule 19(24) to dismiss the petition, the chambers judge did not find it necessary to determine the meaning of s. 256(2)(c) of the Act. Rather, he found that the nature of the fraud alleged in the petition could conceivably constitute "fraudulent means" within the meaning of that section such that the action was not bound to fail. He left the issue of the correct interpretation of s. 256 to the trial judge.

- ¹⁶ Although it is not entirely clear from his reasons, it appears that the chambers judge dismissed the petitioners' application for a declaration that Clark, Petter and the NDP were in breach of s. 256 of the Act on both jurisdictional and discretionary grounds. That is, he found that the court did not have jurisdiction to grant the declaratory relief sought; alternatively, assuming the court had jurisdiction, he found there was no foundation for granting declaratory relief in the circumstances.

Discussion of Issues

(1) Interpretation of Section 256

(i) Submissions of Counsel

- ¹⁷ Counsel for Mr. Conroy submits that the chambers judge erred in finding that the Supreme Court had jurisdiction to deal with the allegations of fraud set forth in the petition. He submits that the Supreme Court's jurisdiction to deal with controverted elections is codified in the Act and that the allegations of fraud in the petition do not constitute an offence under s. 256 of the Act. It follows, he submits, that the Supreme Court does not have jurisdiction to determine the issues raised in the petition.
- ¹⁸ In support of his submission that the allegations set forth in the petition do not constitute offences under s. 256 of the Act, counsel for Mr. Conroy places particular reliance on the origins and legislative history of s. 256. He submits that this history demonstrates that the only fraudulent activity which constituted an offence under the predecessors to s. 256 was fraudulent activity which negated the free will of the voter and interfered with the voting process itself. He submits that fraudulent behaviour which affected the judgment of the voter whether to vote for a particular candidate or political party did not constitute an offence. He further submits that there is no basis for concluding that the legislature intended to expand the categories of fraudulent activity which would constitute an offence under the Act when s. 256 came into force on September 1, 1995.
- ¹⁹ Counsel for Mr. Conroy also contends that the legislature must be presumed to have acted within its constitutional powers in enacting s. 256. He submits that if s. 256 were interpreted as expanding the categories of fraud prohibited under the Act, it would be unconstitutional as trenching on the criminal law powers of the federal government under s. 91(27) of the *Constitution Act, 1982, being Schedule 3 to the Canada Act 1982 (U.K.), 1982, c. 11*.
- ²⁰ Counsel for Hammell and Bowbrick supports Mr. Conroy's submissions. In particular, he supports an interpretation of s. 256 which restricts

the meaning of "fraudulent means" in s. 256 to that which Mr. Conroy submits it bore prior to the 1995 amendment. In the event the phrase "fraudulent means" in s. 256 is capable of two interpretations, he submits the interpretation favouring the MLAs should be adopted, having regard to the "criminal" nature of the provision and the severity of the penalties its breach. He also submits that policy considerations support a narrow interpretation of s. 256.

- 21 Counsel for Hammell and Bowbrick submits that the issues raised in the petition should be resolved under Rule 19(24) by assuming the pleadings are true, then determining the true meaning of s. 256 of the Act, and, finally, deciding whether the action is bound to fail. He submits that the chambers judge erred in failing to adopt this analytical method and, in particular, in failing to determine the correct meaning of s. 256.
- 22 Counsel for the petitioners submits that the chambers judge correctly concluded that their position with respect to whether the conduct of the MLAs could constitute "fraudulent means" within the meaning of s. 256(2)(c), was not bound to fail and should proceed to trial. In counsel's view, the question of the correct interpretation of s. 256 did not have to be resolved on the Rule 19(24) application as long as the interpretation contended for by the petitioners was not bound to fail.
- 23 In the alternative, counsel for the petitioners submits that the origins and legislative history of s. 256 do not support the narrow interpretation of "fraudulent means" which counsel for the MLAs and the NDP seek to attribute to those words. In the further alternative, he submits that the new wording found in s. 256 supports a more expansive interpretation of "fraudulent means" than the predecessor legislation. In that regard, he relies on the "plain meaning" of s. 256 which, he says, clearly supports his submission that "fraudulent means" encompasses not only fraud going to the voting process itself, but also fraud affecting the decision of the prospective voter as to the candidate or party for whom to vote.

(ii) General Principles of Statutory Interpretation

- 24 In a recent decision of the Supreme Court of Canada, *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), Mr. Justice Iacobucci, speaking for the Court, restated the fundamental principle of statutory construction in the following passage at para. 21 of the decision:

Although much has been written about the interpretation of legislation [citations provided], Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory

interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely on s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219 [mirrored in s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238], which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". [Emphasis added]

- 25 In *Rizzo & Rizzo Shoes Ltd., Re*, the Supreme Court of Canada found that the Ontario Court of Appeal had erred in focusing too narrowly on the "plain meaning" of the provision in question and in failing to give adequate consideration to the scheme of the Act, the intention of the legislature and the context in which the words were found. The Court also emphasized that legislative history is a useful tool in determining the intention of the legislature, as is recourse to Hansard. With respect to the use of Hansard as an aid to interpretation, Mr. Justice Iacobucci cited the following passage from *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.) at p. 484, where Mr. Justice Sopinka stated, at para. 35:

... until recently the courts have balked at admitting evidence of legislative debates and speeches. ... The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

With these considerations in mind, we turn to the legislation in question.

(iii) *Relevant Statutory Provisions*

- 26 The Act is divided into thirteen Parts covering a myriad of matters including the calling of an election, qualifications of voters and candidates, the voting process, registration of political parties and constituency associations, election financing and communications, and offences under the Act.

- 27 Part 8 of the Act (ss. 150–153), entitled “Invalid Elections”, provides the mechanism for challenging the validity of the election of a candidate. Section 150 provides, in part, as follows:

- (1) The right of an elected candidate to take office or the validity of an election may not be challenged except by an application under this section.
- (2) An application may be made in accordance with this section to the Supreme Court for a declaration regarding the right of an individual to take office or the validity of an election.
- (3) [time limits for application]
- (4) An application may be made only by a candidate in the election, the chief electoral officer or a voter for the electoral district for which the election was held.
- (5) An application may be made only on one or more of the following bases:
 - (a) that a candidate declared elected was not qualified to hold office at the time he or she was elected;
 - (b) that an election should be declared invalid because it was not conducted in accordance with this Act or a regulation under this Act;
 - (c) that an election should be declared invalid because section 255, 256, 257 or 258 was contravened.

[Emphasis added]

- 28 Section 151 provides for the powers of the court on an application pursuant to s. 150:

151

- (1) On the hearing of an application, the court may do any of the following:
 - (d) declare that an election is invalid and that the office is vacant.
- (2) The court must not declare an election invalid by reason only of an irregularity or a contravention of this Act or a regulation under this Act if the court is satisfied that
 - (a) the election was conducted in good faith and in accordance with the principles of this Act, and
 - (b) the irregularity or contravention did not materially affect the result of the election.
- (3) The court may confirm the election of a candidate in relation to which the court finds there was a contravention of section 255, 256, 257 or 258 if the court is satisfied that
 - (a) the candidate did not contravene the applicable section, and

- (b) the contravention did not materially affect the result of the election.

[Emphasis added]

29 Section 153 provides that the chief electoral officer must present a report of the court's decision to the Speaker which, in turn, must be laid before the Legislative Assembly as soon as possible.

30 Part 12 (ss. 251-267) of the Act deals with offences under the Act. The section with which we are primarily concerned is s. 256, which is headed "Intimidation". It provides as follows:

- (1) An individual or organization must not intimidate an individual for any of the following purposes:
 - (a) to persuade or compel an individual to vote or refrain from voting;
 - (b) to persuade or compel an individual to vote or refrain from voting for or against a particular candidate or a candidate for a particular political party;
 - (c) to punish an individual for having voted or refrained from voting as described in paragraph (a) or (b).
- (2) An individual or organization must not, by abduction, duress or fraudulent means, do any of the following:
 - (a) impede, prevent or otherwise interfere with an individual's right to vote;
 - (b) compel, persuade or otherwise cause an individual to vote or refrain from voting;
 - (c) compel, persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate or for a candidate of a particular political party.
- (3) An individual or organization prohibited from doing something by this section must not do the prohibited act directly, indirectly, or by another individual or organization on behalf of the individual or organization who is subject to the prohibition.
- (4) An individual or organization who contravenes this section commits an offence and is liable to one or more of the penalties referred to in section 255(7).

[Emphasis added]

31 The penalties provided under s. 255 (7) include a fine of not more than \$10,000 and imprisonment for a term not longer than two years.

(iv) Plain Meaning

32 Counsel for the petitioners urges us to adopt the plain meaning of the words in s. 256(2) of the Act. In his view, the wording of the section clearly establishes that the legislature intended to regulate not only fraudulent con-

duct aimed at the voting process itself, but also fraudulent conduct aimed at the judgment or decision-making process of voters in deciding for whom to cast their ballot. He submits that s-s. 256(2)(a) and (b) deal with interference with an individual's right or ability to vote; that is, with the voting process itself. Subsection (2)(c), on the other hand, refers to methods of persuasion which cause an individual to vote "for a particular candidate" or "for a candidate of a particular party". He submits that the difference in the language used in the three subsections must be given some meaning and that the only reasonable meaning of s-s. 256(2)(c) is that for which he contends.

- 33 This interpretation of s. 256(2) is compelling if one focuses solely on the words of the section itself. As noted in the *Rizzo & Rizzo Shoes Ltd.*, *Re* decision, however, it is not sufficient to look solely at the words of the section. In order to ascertain its meaning, it is necessary to place the provision in the context of the scheme of the Act, the object of the Act and the intention of the legislature.
- 34 A useful starting point in this regard is to examine the historical and legislative background giving rise to election legislation and, in particular, to s. 256.

(v) *Origins and Legislative History*

- 35 In his factum, counsel for Mr. Conroy sets out an extensive history of election legislation dating back to its pre-statutory origins in the United Kingdom. For the purpose of this analysis, we do not find it necessary to reach back so far in time. It appears, however, that the first instance in which British courts of law were given statutory jurisdiction over any matter pertaining to elections was under the *Corrupt Practices Prevention Act, 1854*, 17 & 18 Vict. c. 102. Under this Act, the courts were given jurisdiction to try prosecutions for three "corrupt practices": bribery, treating (serving of alcohol) and undue influence. Corrupt practices were distinct from illegal practices which were not then included in the legislation. *Halsbury's* describes the difference between corrupt practices and illegal practices as follows: *Halsbury's Statutes of England*, vol. 8, 2d ed. (London: Butterworths, 1949) p. 459:

Election offences consist of corrupt practices, illegal practices, and illegal payment, employment or hiring. ... The distinction between corrupt practice and the other offences is, broadly speaking, that corrupt practice may be regarded as something bad in itself wherever it occurs (*i.e.*, bribery or intimidation), whereas illegal practice may be bad in itself (*e.g.*, publishing false statements contrary to s. 91, p. 655, *post*), but also includes something not necessarily bad but which has been forbidden by the legislature on grounds of policy (*e.g.*, employment of paid canvassers, hiring of bands of music, or hiring of licensed premises for

committee rooms). Recent legislation has largely assimilated the law relating to corrupt and illegal practices so far as concerns parliamentary and local government elections.

Halsbury's notes that corrupt practices were criminal offences whereas illegal practices were not.

- 36 The relevant section of the *Corrupt Practices Prevention Act, 1854* for our purposes provided as follows:

V. Every Person who shall, directly or indirectly, by himself, or by any other Person on his Behalf, make use of, or threaten to make use of, any Force, Violence, or Restraint, or inflict or threaten the Infliction, by himself or by or through any other Person, of any Injury, Damage, Harm, or Loss, or in any other Manner practise Intimidation upon or against any Person in order to induce or compel such Person to vote or refrain from voting, or on account of such Person having voted or refrained from voting, at any Election, or who shall, by Abduction, Duress, or any fraudulent Device or Contrivance, impede, prevent, or otherwise interfere with the free Exercise of the Franchise of any Voter, or shall thereby compel, induce, or prevail upon any Voter, either to give or to refrain from giving his Vote at any Election, shall be deemed to have committed the Offence of undue Influence, and shall be guilty of a Misdemeanour, and in Scotland, of an Offence punishable by Fine or Imprisonment, and shall also be liable to forfeit the sum of Fifty Pounds to any Person who shall sue for the same, together with full Costs of Suit. [Emphasis added]

- 37 The process for trying controverted elections was reformed in 1770 and 1839 but it was not until the *Parliamentary Elections Act, 1868*, 31 & 32 Vict., c. 125 that Parliament first provided that the courts could try controverted elections, "with the same powers, subject to the Act, as a judge of one of the superior courts and as a judge of Assize and Nisi Prius". Pursuant to that legislation, the court could declare an election void if the outcome was materially affected by a contravention of the *Corrupt Practices Prevention Act, 1854* or by a corrupt practice contrary to the common law of Parliament.

- 38 In British Columbia in 1871, the legislature introduced two election statutes: *The Corrupt Practices Act, 1871* and *The Trial of Controverted Elections Act*. These acts were replicas of the corresponding British statutes referred to in para. 37 of these reasons and, over time, were consolidated into the *Provincial Elections Act* in 1897. The predecessor to s. 256 in that legislation remained essentially unchanged from 1871 until 1985. During those years, the provision appeared under the heading "Undue Influence"; in 1985 the heading was changed to "Intimidation of voters".

- 39 As of 1979, the *Election Act*, R.S.B.C. 1979, c. 103 defined "corrupt practice" in s. 1 as follows:

"corrupt practice" means bribery, treating, illegal payment and undue influence, or any of those offences defined by Act of the Legislature or by any other law in force in the Province;

- 40 This definition and terminology were dropped from the legislation when the 1979 Act was repealed and replaced by the *Election Act*, R.S.B.C. 1996 c. 106, with which we are here concerned.

(vi) *The Enactment of Section 256*

- 41 At the time the *Election Act* 1996 was introduced as Bill 28 on June 1, 1995, the then Attorney-General, the Honourable Colin Gabelmann, stated as follows:

Hon. Speaker, I'm pleased to introduce Bill 28, Election Act. This bill repeals and replaces the current Election Act which had its last comprehensive revision in 1920. The current act is extremely outdated and required extensive revising and updating to better serve the needs and expectations of British Columbians.

With the introduction of this bill, government is fulfilling its commitment to modernize the electoral process and to make it more fair, open and accessible to all voters. ... [p. 14791]

- 42 On June 27, 1995, when the Bill received second reading, the Honourable Colin Gabelmann stated:

I would concede in beginning this that this is slightly more than housekeeping. The bill we're talking about today really concerns the foundation of our democratic system. I think it's fair to say that no [more] important subject would ever come before this Legislature, nor, in fact, before any parliament. ...

It's difficult to believe, but the Election Act has not been amended or revised in a comprehensive way since 1920. Electoral reform has suffered decades of neglect — neglect that now ends with Bill 28. In Bill 28 we are fulfilling our commitment to modernizing the electoral process. Bill 28 proposes to repeal and replace antiquated legislation with a new act that will meet the needs and expectations of British Columbians today. Bill 28 will ensure that democratic power in British Columbia resides in all citizens. [p. 16240]

- 43 We quote these provisions in answer to the submission of the MLAs and the NDP that, in enacting the Act, the Legislature was simply modernizing the language of the Act without creating substantive changes. It is apparent from reading Hansard on this subject that the intention of the Legislature was to do far more than simply reframe the Act in plain language. Many new sections were added to the Act and it is apparent that the legislation was regarded as bringing about substantial reforms to electoral law. This was also evident in the *Recall and Initiative Act*, R.S.B.C. 1996, c. 398, an

innovative piece of legislation in British Columbia passed in the legislative session preceding the enactment of the Election Act.

- 44 We are of the view that Hansard is of little assistance, however, in shedding additional light on the intention of the legislature in enacting s. 256(2) of the Act.

(vii) *The Authorities*

- 45 At this point in our analysis, it is useful to review the authorities considering the meaning which the courts attributed to the legislative provisions preceding s. 256 with a view to determining whether fraud of the nature alleged in this case would have constituted an offence under those provisions. This question was the focus of a significant portion of the argument before us.

- 46 For purposes of comparison, it is useful to set out s. 256 and its immediate predecessor, s. 165, together:

165. Every person who, directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence or restraint, or inflicts or threatens the infliction, by himself or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practises intimidation on or against any person, in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting, at any election, or who, by abduction, duress or any fraudulent device or contrivance, impedes or prevents or otherwise interferes with the free exercise of the franchise of any elector, or thereby compels, induces or prevails on any elector either to give or refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and is guilty of an offence against this Act, and is liable, on summary conviction, to a penalty not exceeding \$250, and is also liable to forfeit the sum of \$250 to any person who sues for the same, together with the full costs of suit.

[256]

- (2) An individual or organization must not, by abduction, duress or fraudulent means, do any of the following:

- (a) impede, prevent or otherwise interfere with an individual's right to vote;
- (b) compel, persuade or otherwise cause an individual to vote or refrain from voting;
- (c) compel, persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate or for a candidate of a particular political party.

- 47 As earlier noted, counsel for the MLAs and the NDP submit that s. 165 and its predecessors dealt only with fraudulent means which interfered with the freedom of the individual to vote or the voting process itself; it did not encompass fraudulent means which influenced the manner in which the in-

dividual voted, or the decision of that individual as to the person or party for whom to vote. They submit that the authorities considering earlier provisions in substantially the same language as s. 165 support this interpretation.

48 In fact, very few of the cases to which we were referred deal with the predecessor provisions to s. 256. The two decisions which are most directly on point are *In Re East Northumberland Election* (1875), 1 H.E.C. 387 (Ont.) and *R. v. Rowe*, [1992] 4 All E.R. 821 (Eng. C.A.).

49 In *Re East Northumberland*, one issue was whether a circular wrongfully alleging that one of the candidates had despaired of winning and, therefore, wanted his friends to vote for one of the other candidates, was a fraudulent device to influence voters. In that regard, Mr. Justice Gwynne stated at pp. 390-91:

As to the other point raised, namely, the issuing of the circular on the Saturday night preceding the polling day, there is no doubt in my mind that all the parties to the issuing of that circular were persons who, equally with Richmond, who was himself one of them, must for the same reason be regarded as the respondent's agents, for whom he must be held responsible. I am, however, of opinion that, even assuming the matters stated in the circular to be false to the knowledge of the parties issuing it, it does not come within the 72nd sec. of the Act of 1868, which enacts that "everybody who shall directly or indirectly, by himself or by any other person on his behalf, by any fraudulent device or contrivance impede, prevent or otherwise interfere with the free exercise of the franchise of any voter, shall be deemed to have committed the offence of undue influence." It is, in my judgment, distinguishable from the *Gloucester* case (2 O'M. & H. 60), which is the only case reported having any resemblance to the present. There the act complained of was one which, if it had been designed with the intent imputed, would have been calculated to have the effect of misleading persons, without any exercise of judgment, to place their mark on the ballot paper opposite the respondent's name only, and so have been calculated to make persons, by a trick and deception, vote for a candidate for whom at the time of voting they did not intend to vote. In the case before me, the most that can be said is (assuming the statement in the circular to be false to the knowledge of the parties issuing it), that they were by a falsehood appealing to the electors to exercise their judgment in voting for the friend of the parties issuing the circular. Now, I do not think that this clause of the statute was intended to cover cases where parties, although it be by falsehood and slander, appeal to the electors to exercise their judgment how to vote. Election squibs, it is to be regretted, are accustomed to deal freely with the character of opposing candidates; this, although a practice which is immoral in the extreme, and to be condemned by all honest men, has not as yet, in my judgment, been touched by legislation. [Emphasis added]

50 This authority is consistent with the interpretation which counsel for the MLAs and the NDP seek to have us place on the language of s. 256.

- 51 By way of contrast, counsel for the petitioners referred the Court to the relatively recent decision of the English Court of Appeal in *Mainwaring*. In that case, shortly before local government elections, the Liberal party, which was contesting a London borough, distributed a leaflet designed to appear as if it had been prepared by the Labour party for distribution to prospective Labour voters. The leaflet contained factually accurate but politically controversial statements of the Labour party's policies which had been selected by the distributors as being policies which might not be acceptable to the Labour party's likely voters in the borough. The Liberal party printed its own name in minuscule letters on the leaflet to comply with the requirements of the *Representation of the People Act 1983* (U.K.), which provided that the name and address of the distributing party had to be on the publication. The Liberal party's candidates were elected.
- 52 The unsuccessful Labour candidates presented petitions to challenge the election of the successful candidates under s. 115(2) of the Act, on the basis that the latter's actions constituted undue influence. They alleged that, by a "fraudulent device" the Liberal party candidates had impeded or prevented the free exercise of the franchise of an elector and that the election, therefore, was void.
- 53 The election commissioner dismissed the petition on the ground that, although the leaflet was intended to deceive, it could not be a "fraudulent device" because it was not false in content. He also found that no one had actually been deceived by the leaflet as the petitioners had discovered the deceit prior to voting.
- 54 On appeal, the Divisional Court held that the leaflet was fraudulent within the meaning of the Act and that the inescapable inference from the facts was that the free exercise of the franchise of some electors had been impeded by virtue of the deception. The appeal was allowed on that basis.
- 55 On further appeal to the Court of Appeal, that Court agreed that the leaflet was a fraudulent device within the meaning of the Act, but concluded that the Divisional Court had not applied the proper standard of review to the Commissioner's finding of fact that those to whom the leaflet had been directed had not been deceived. The appeal was, therefore, allowed.
- 56 Section 115(2)(b) of the English Act provided that:

A person shall be guilty of undue influence ... if, by abduction, duress or any fraudulent device ... he impedes or prevents the free exercise of the franchise of an elector ... or so compels, induces or prevails upon an elector ... either to vote or to refrain from voting.

This language is essentially the same as that found in s. 165 of the *Election Act*, R.S.B.C. 1979, c. 103, which was the section in place prior to the en-

actment of s. 256. In analyzing the meaning to be given to this section, Farquharson L.J. noted there was very little authority on point. At p. 826 of the decision, he stated:

I think it is more likely that the difference between 'impeding' and 'preventing' lies in the effect which the device has on the voter's choice of candidate. As I see it, an improper influence which is brought to bear on the mind of a voter and causes him to vote as the person exercising that improper influence intended (when otherwise he would not), 'prevents' the free exercise of his franchise. A voter who, though influenced by the impropriety, is not thereby caused to vote in the way intended (either because he was going to vote that way anyway, or because the device did not cause him to change his allegiance), is 'impeded' in the free exercise of his franchise. [Emphasis added]

- 57 Lord Justice Nolan, in concurring reasons, expressed the view that, in addition to physical force or threats, psychological intimidation and deceit were factors which could impede a voter in the exercise of his or her franchise. He also commented adversely on the archaic language in which s. 115(2)(b) was framed.
- 58 Parker L.J. agreed with the reasons of Farquharson L.J. Leave to appeal to the House of Lords was refused.
- 59 The *Mainwaring* decision lends support to the interpretation of the legislation preceding s. 256 urged on us by the petitioners. Although not binding on us, as a decision of the English Court of Appeal, it is of persuasive precedential value.
- 60 Counsel also referred to several Australian decisions which consider electoral offence provisions similar to those found in the Act. These cases discuss some of the policy issues which counsel submit are also relevant under the B.C. legislation in ascertaining the intention of the Legislature in enacting the offence provisions found in the Act.
- 61 In *Smith v. Oldham* (1912), 15 C.L.R. 355 (Australia H.C.), the issue was whether a provision in the *Commonwealth Electoral Act* was within the power of the Commonwealth Parliament. In essence, the provision required that every article, report or like material published in any newspaper during the course of an election which commented on the candidates or the issues be signed by the author(s). The appellants argued that the provision was not legislation in relation to the conduct or control of elections, but was, rather, legislation in relation to the conduct and control of newspapers, a matter which was within the power of the states. The High Court dismissed their appeal.
- 62 While the issue in *Smith* was considerably different from that here, the court's discussion concerning the purpose of electoral legislation, and, in

particular, concerning provisions relating to the dissemination of information relating to the issues and candidates is of interest.

- 63 Chief Justice Griffith stated that the purpose of electoral legislation is to secure freedom of choice to the voters through the prevention of, amongst other things, intimidation and undue influence.

- 64 Mr. Justice Isaacs dealt with the appellants' argument that the object of an election is to obtain a formal registration of the actual opinion of each elector without regard to the way in which that opinion had been formed. At pp. 362-63 of the decision, he stated:

So far as concerns the mechanical process of election that is true enough; but to confine the power of Parliament to a supervision of the mechanism is to neglect the vital principle behind it. The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstances into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances.

So far from the latter consideration being foreign to the subject of election, it is of the first importance. For an opinion into which a man has been tricked or misled, even innocently, is a double wrong. It means not merely a loss to the side on which he would otherwise have cast the vote, but it also strengthens their opponents.

It is admitted that the Parliament can forbid and guard against fraudulent misrepresentation. It would shock the conscience to deny it. On what ground can so much be conceded, unless because it is an incidental power to protect the voters from intended deception?

.....
If the purity and reality of elections be within the ambit of the [Parliament's] power, if in the public interest the electors may be protected from the open assaults of force and threats and corruption, it is impossible to exclude the right also to guard them against the more insidious, and, in many respects, the more dangerous form of winning their assent by acts apparently fair and disinterested, but which may be so only on the surface. [Emphasis added]

- 65 Thus, in *Smith*, the court took a broad view of the power of Parliament to safeguard the public interest against misrepresentations affecting, not merely the right to cast a vote, but the right to make an informed decision for whom to vote, by compelling newspapers to comply with the requirement that specified electoral information be attributed to the author.
- 66 In a more recent decision, *Evans v. Chrichton-Browne*, [1980] 147 C.L.R. 169 (Australia H.C.), the court considered a different section of the

Commonwealth Electoral Act dealing with "illegal practices". The section in question provided that an illegal practice included:

(e) Printing, publishing, or distributing any electoral advertisement, ... containing any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote:

- 67 In construing this provision, the court concluded that the words "in or in relation to the casting of his vote" referred to the act of recording or expressing the elector's political judgment and not to the formation of that judgment. In that regard, the court relied on what they regarded as the plain meaning of the phrase "cast a vote", meaning "to deposit (a voting paper or ticket); to give (a vote)." The court specifically rejected the submission that the words "in relation to" were capable of a broader meaning which would encompass the formation of the political judgment which precedes the casting of the vote. In so doing, the court agreed with the underlined excerpt just quoted from the judgment of Isaacs J. in *Smith* as a statement of general principle. The court was of the view, however, that the broader interpretation of the words "in relation to" contended for by the appellants raised troubling policy concerns. The court referred to some of those concerns at pp. 206-7:

On the other hand, the framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not unduly restricted, especially during an election campaign, and the practical difficulties that might result if an election were liable to invalidation on the ground that statements made in the interests of candidates were found in subsequent litigation to be untrue or incorrect. This Court is not concerned with what it would be desirable for Parliament to provide, but with the meaning of what Parliament has in fact provided, but the possible difficulty and inconvenience to which the wider construction of the provision might give rise is a matter properly to be considered in determining the meaning of the words used if they are ambiguous.

- 68 The court then noted that the provision in question applied to incorrect as well as untrue statements, and that there was nothing in the section to differentiate between statements of fact, opinion, belief, or intention. At p. 207, the court stated:

But even if the paragraph were thought to apply only to those statements affecting a voter's choice of candidate which appear to be statements of fact, that construction would require an election campaign to be conducted in anticipation of proceedings brought to test the truth or correctness of any statement made in the campaign. Indeed any person who published an electoral advertisement containing an incorrect Statement of fact might be exposed to criminal proceedings. In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal proceedings; and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words. Neither

the words not [sic] the context suggest such an intention either clearly or at all. Of course, as the petitioners submitted, an election would not be declared void unless the Court of Disputed Returns was satisfied that the result of the election was likely to be affected by the illegal practice and that it was just that the candidate should be declared not to be duly elected or that the election should be declared void (see s. 191(3)). Nevertheless it can be seen that the result of many elections might be rendered uncertain if any untrue or incorrect statement of fact, opinion, belief or intention might have the effect of invalidating the election if the statement was intended or likely to mislead or improperly interfere with any elector in the formation of his political judgment. [Emphasis added]

69 In the result, the court found that it could not find any reason to depart from the "natural meaning" of the words of the section, which they found referred to the act of recording the political judgment which the elector had made, rather than to the formation of that judgment.

70 Policy considerations of a constitutional nature were raised in *Cameron v. Becker* (1995), 64 S.A.S.R. 238 (Australia Full Ct.). There, the appellant was convicted of an offence under the *Electoral Act* 1985 (S.A.), namely, authorizing the publication of an electoral advertisement which contained a statement of fact which was inaccurate or misleading to a material extent. The appellant argued that the relevant provision of the *Electoral Act* contravened the implied protection of free speech on political matters found in the Commonwealth Constitution and in the *Constitution Act 1934* (S.A.). The court dismissed the appeal, holding that freedom to engage in political discourse is not absolute and must give way in some circumstances to other legitimate interests including the interests of justice, the protection of an individual's reputation and the upholding of the community's sense of decency.

71 In considering whether the defence of honest but mistaken belief was available to a person charged under the Act, Lander J. made the following comments at p. 252 concerning the general purpose of electoral legislation and, in particular, concerning the offence sections dealing with the publishing of misleading or inaccurate information:

The *Electoral Act* has as its principal purpose the regulation of elections to ensure that the election is conducted freely and democratically. It acknowledges by implication that a free and democratic election requires freedom of speech so that all candidates, all electors and the publishing media can freely and frankly exchange views about candidates and issues. A democratic election requires that the electorate be informed so that the electorate can exercise an informed vote. In *Australian Consolidated Press Ltd. v. Uren* (1966) 117 C.L.R. 185 at 210: Windeyer J. said:

Freedom at election time to praise the merits and policies of some candidates and to dispute and decry those of others is an essential of parliamentary democracy.

It also requires that the elector be not interfered with or intimidated such that the vote that is exercised is not truly the vote that the elector would otherwise have made. It requires that a candidate be free of the offers or the soliciting of bribes.

Section 113 requires that a political party or a candidate or any electors not publish statements of fact relating to an election, which are inaccurate and misleading to a material extent. That section recognises that a truly informed elector is one who has not been subjected to deceit or misrepresentations such that the elector might vote contrary to the manner in which that elector would have voted but for the deceit or misrepresentations. While s. 113 does interfere with the right of the freedom of speech, it does so for the purpose of protecting the electors from being misled and deceived. The Act, I think, attempts to balance the concept of freedom of speech and the right to be properly informed. [Emphasis added]

Mr. Justice Lander went on to refer, with approval to the passages which we have quoted at paras. 64 and 68 of these reasons from the *Smith* and *Evans* decisions.

- 72 Counsel for the MLAs and the NDP rely on the passage from the *Evans* decision, quoted at para. 68 of these reasons, to suggest that uncertainty and mayhem would result if candidates for election were required to justify every statement or representation made by them during the course of an election campaign. Further, counsel submit that holding candidates accountable for their statements by use of court proceedings such as these would have a "chilling effect" on freedom of political speech. Counsel submit that these considerations favour restricting the meaning of "fraudulent means" in s. 256 to means directed to the act of voting and not to the formation of the political judgment for whom to vote.
- 73 In the context of the allegations of fraud raised in the petition, we do not find this argument persuasive.
- 74 In our view, the primary object of provisions such as s. 256 of the *Election Act* is to maintain and enhance the integrity of the electoral process. In that regard, it is reasonable to conclude that, in enacting s. 256 and its predecessors, the Legislature intended to safeguard the public from fraudulent conduct on the part of, or on behalf of, a candidate or a political party, which was of sufficient import that it influenced the judgment of potential voters by causing them to vote other than they would have but for the fraudulent conduct. We are unable to find any sound justification for interpreting the legislation so narrowly as to permit electoral candidates or political parties to fraudulently mislead the public with respect to material issues which could reasonably be expected to affect their decision for whom to vote. We are not persuaded that an interpretation of s. 256 such as that signalled in *Mainwaring* would give rise to the chaotic consequences suggested by the MLAs and the NDP. In our view, holding political candidates and parties to

a standard of non-fraudulent dealing with the public is in accord with maintaining the integrity of the electoral process. In that regard, we would echo the words of Isaacs J. in *Smith* quoted at para. 64 of these reasons.

75 That is not to say that every misrepresentation, no matter how trivial, would give rise to an offence under s. 256 of the Act. In our view, the type of misrepresentations which would fall under "fraudulent means" within the meaning of s. 256(2)(c) would be misrepresentations of material fact which were intended to, and did, lead voters to vote for a candidate or party for whom the voter would not otherwise have voted, and which were made by or on behalf of a candidate or political party knowing that they were false, or without regard to their truth or falsity.

76 Statements of intention or belief, and statements which any reasonable person would attribute to mere puffery would not constitute fraudulent means within the meaning of this section.

77 In response to the argument that such an interpretation of s. 256 would have a chilling effect on freedom of political speech, or that it would otherwise be inimical to *Charter* values, we would adopt the statement of Lander J. in *Cameron* quoted at para. 71 of these reasons. Freedom of speech is a cherished value in our society, but we are unable to conclude that this value is diminished by an interpretation of s. 256 which penalizes fraudulent misrepresentations concerning material facts which go to the heart of the voter's decision for whom to vote. As noted in the Australian decisions to which we have referred, freedom of speech, even political speech, knows some limits.

(viii) Constitutional Considerations

78 As earlier stated, none of the parties attacked s. 256(2)(c) of the Act on constitutional grounds. Counsel for the MLAs and the NDP submit, however, that the expansive interpretation of s. 256 advocated by the petitioners should be avoided, since such an interpretation would effectively create a new category of fraud and thus, a new criminal offence.

79 Counsel for Mr. Conroy frames this argument in the following manner at para. 58 of his factum:

Another rule of statutory interpretation is the presumption that the legislature intends to enact statutes that are consistent with the constitution. It would be inconsistent with the constitution to interpret s. 256 of the *Election Act* as a broader offence than the old offence of "undue influence" because: (a) to have expanded the offence would have been an impermissible intrusion by the British Columbia legislature on the federal criminal law power; and (b) an expansive interpretation would be inconsistent with the constitutional principle of freedom of political speech.

- 80 This argument relies heavily on the MLAs' earlier submission that fraud affecting the judgment of the voter for whom to vote was not prohibited conduct under the legislative provisions preceding s. 256. In view of the *Mainwaring* decision, this submission cannot succeed. Fraudulent means affecting the decision of the voter for whom to vote was recognized as prohibited conduct under legislation mirroring the language of the statutory predecessors to s. 256.
- 81 In the absence of a constitutional challenge to s. 256, we do not propose to say more concerning this issue.

(ix) Summary - Interpretation of Section 256

- 82 In our view, the wording of s. 256 in the context of the Act as a whole, the legislative history, and the intent and object of the Legislature, taking into account the policy and constitutional considerations to which we have referred, all support the interpretation of s. 256 contended for by the petitioners. In summary, "fraudulent means" in s. 256 includes fraudulent misrepresentations of material fact, made knowingly or recklessly, which induce potential voters to vote for a party or candidate other than the one the voter would have voted for but for the misrepresentation.
- 83 In the result, we would dismiss the MLA appeal on the basis that the trial judge's conclusion that the petition should precede to trial against them was correct, albeit not for the reasons given by him.

(2) Application for a Declaration

(i) Submissions of Counsel

- 84 Counsel for the petitioners submits that the chambers judge erred either in finding that the court did not have jurisdiction to grant a declaration that the NDP, Clark and Petter had breached s. 256(2)(c) of the Act, or, alternatively in finding that the application for such declaratory relief was otherwise bound to fail. He submits that the power of the court to grant declaratory relief lies in the inherent equitable jurisdiction of the court, together with Rule 5(22) of the *Rules of Court*, which provides:

No proceeding shall be open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

Counsel also submits that, assuming the court has jurisdiction to grant the declaratory relief claimed, the decision whether to grant the relief should be decided at trial.

- 85 Counsel for the NDP, Clark and Petter, on the other hand, submit that the application for declaratory relief sought by the petitioners was bound to fail on any one of the following grounds:

- (1) The *Election Act* is a code: it does not provide for declaratory relief of the nature sought: the court, therefore, has no jurisdiction to grant the declaration;
- (2) If the court has jurisdiction to grant declaratory relief of the nature sought, the petitioners cannot obtain that relief in the class action proceeding, but must commence a separate action;
- (3) If the court has the discretion to grant declaratory relief of the nature sought, there is no factual basis for exercising that discretion in favour of the petitioners.

(ii) *Discussion*

- 86 It is common ground that there is no provision in the Act for granting declaratory relief of the kind sought by the petitioners. Rather, s. 150 of the Act limits the circumstances in which the court may grant declaratory relief to those set forth in the Act. As earlier noted, the relevant provisions are as follows:

- 150 (1) The right of an elected candidate to take office or the validity of an election may not be challenged except by an application under this section.
- (2) An application may be made in accordance with this section to the Supreme Court for a declaration regarding the right of an individual to take office or the validity of an election.
-
- (4) An application may be made only by a . . . voter for the electoral district for which the election was held.
- (5) An application may be made only on one or more of the following bases:
- (a) that a candidate declared elected was not qualified to hold office at the time he or she was elected;
 - (b) that an election should be declared invalid because it was not conducted in accordance with this Act or a regulation under this Act;
 - (c) that an election should be declared invalid because section 255, 256, 257 or 258 was contravened.
-

Assuming the criteria set out in s. 150 are met, s. 151 sets out the powers of the court to grant declaratory relief.

- 87 If the Act is a code, the court does not have any residual inherent jurisdiction to grant declaratory relief beyond that set out in the Act. This is so despite the otherwise broad powers of the court to grant declaratory relief referred to in such cases as *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), and *Kourtesis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, 78 B.C.L.R. (2d) 257 (S.C.C.).
- 88 In our view, an analysis of the history of electoral legislation supports the submission on behalf of the NDP, Clark and Pether that the Act is a code, at least insofar as the powers of the courts with respect to controverted elections is concerned. Support for this conclusion may also be found in the reasons for judgment of Madam Justice McLachlin (L'Heureux-Dubé J. concurring) in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 (S.C.C.).
- 89 In *Harvey*, a member of the Legislative Assembly was convicted of a corrupt practice under s. 111(1) of the *Elections Act* of New Brunswick for inducing a minor to vote, knowing that she was ineligible. Section 119 of that Act provided that upon conviction, the member was disqualified from voting, holding government office, standing for election for five years, or continuing to sit in the Legislative Assembly. The member challenged s. 119 as a violation of his rights under s. 3 of the *Canadian Charter of Rights and Freedoms*, which provides that every citizen of Canada has the right to vote and to seek office.
- 90 Mr. Justice La Forest, speaking for the majority in *Harvey*, found that s. 119(c) of the Act was *prima facie* unconstitutional as violating the member's rights under s. 3 of the *Charter*, but that it was a justifiable limit under s. 1.
- 91 Madam Justice McLachlin, in concurring reasons, analyzed the issue from a different perspective. She concluded that the disqualification of members of the legislative assembly fell within the historical privilege of the Legislature and was, therefore, immune from judicial review. She concluded that, although the court has a screening role to play in determining whether a matter falls within the scope of parliamentary privilege, if the matter falls within the privilege, the courts have no power of review. The matter must be left to the Legislature, except insofar as the Legislature has seen fit to delegate the matter to the courts, and then only to the extent the legislation specifically provides.

- 92 In coming to this conclusion, McLachlin J. adopted the following passage from *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982) at para. 78, where J. Maingot Q.C. stated:

What is clear is that the ordinary civil and criminal jurisdiction of the courts does not extend to determining the rights of members to sit in the House, and the courts equally have nothing to do with questions affecting its membership except insofar as they have been specially designated by law to act in such matters as, for example, under the *Dominion Controverted Elections Act*. [at pp. 161-62] [Emphasis added]

- 93 In Canada, provincial Legislatures have delegated certain controverted election proceedings to the court, as for example, under the B.C. *Election Act*. There is nothing in that Act, however, which gives the court the power to make general declarations in relation to controverted elections such as that sought by the petitioners.

(iii) *Conclusion - Declaratory Relief*

- 94 In the result, we would dismiss the appeal of the petitioners against the NDP, Clark and Petter on the basis that the court has no jurisdiction to grant the declaratory relief claimed by the petitioners.

Conclusion

- 95 We would dismiss the appeal of Hammell, Bowbrick and Conroy and direct that the petition against them proceed to trial.
- 96 We would also dismiss the appeal of the petitioners against the NDP, Clark and Petter.
- 97 Costs shall follow the event.

Appeal dismissed; cross-appeal dismissed.

Appendix G





Citation: Friesen v. Hammell
2000 BCSC 1185

Date: 20000803
Docket: A962818
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LEONARD FRIESEN, HOLLY KUZENKO, MILDRED UMBARGER

PETITIONERS

AND:

SUE HAMMELL, GRAEME BOWBRICK, ED CONROY

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE HUMPHRIES

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J. Waddell, Q.C.

Date and Place of Trial:

April 10, 11, 12, 13, 17,
18, 19, 20, 25, 26, 27, 28,
May 30, June 26, 27, 28, 29,
30, July 4, 5, 2000
Vancouver, B.C.

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OVERVIEW

[1] On May 28, 1996, the New Democratic Party ("NDP") was re-elected as the governing party in British Columbia. The Petitioners, Mr. Friesen, Ms. Kuzenko, and Ms. Umbarger say they were induced to vote in the election of May 1996 for the NDP candidates in their respective ridings by fraudulent means, contrary to section 256 of the **Election Act** (the relevant sections are annexed as Appendix 1). They wish to have the elections in each of their ridings declared invalid and the relevant offices vacated.

[2] At the time of the election, Mr. Friesen lived in the riding of Surrey-Green Timbers and voted for Sue Hammell. Ms. Kuzenko lived in the riding of New Westminster and voted for Graeme Bowbrick. Ms. Umbarger lived in the riding of Rossland-Trail and voted for Ed Conroy.

[3] The Petitioners do not allege any wrongdoing by the Respondents themselves. Ms. Kuzenko agreed that Mr. Bowbrick was an honourable person, and Ms. Umbarger agreed that Mr. Conroy was a person of integrity. Mr. Friesen did not hear or meet Ms. Hammell during the election campaign, but did not testify to being misled in any way by Ms. Hammell herself.

[4] The basis of the Petitioners' claim is that during the election campaign, statements were made by Mr. Clark, the Premier, and possibly Ms. Cull, the Finance Minister, to the effect that the NDP had a balanced budget for the 1995-96 year and expected a further balanced budget in 1996-97. There is a third representation alleged - that the government could afford, as a result of their fiscal prudence, a capital development program in the amount of \$250 million to improve the province's infrastructure, but this was not covered in evidence or argument and I will not deal with it further.

[5] According to the Court of Appeal's decision on the earlier motion in this case (*Friesen v. Hammell* (1999), 57 B.C.L.R. (3d) 276), the purpose of section 256 of the *Election Act* is to enhance the integrity of the electoral process by holding political candidates and parties to a standard of non-fraudulent dealing with the public. A vote obtained by fraudulent means is one obtained by "misrepresentations of material fact which were intended to, and did, lead voters to vote for a candidate or party for whom the voter would not otherwise have voted, and which were made by or on behalf of a candidate or political party knowing they were false, or without regard to their truth or falsity." The term "fraudulent means" as used in s. 256 would not include

"statements of intention or belief, and statements which any reasonable person would attribute to mere puffery."

[6] If I were to find a breach of section 256 of the **Act**, before deciding whether to set aside any of the elections, in any of the ridings, I must consider, pursuant to section 151(3), whether the relevant candidate contravened the section (it is conceded here that each one did not), and whether the contravention materially affected the result of the election.

[7] It is important to note that this case is narrowly defined by the petition and must be decided upon the evidence presented in court. It is not a general inquiry into the NDP, nor is it an evaluation of the reports and speculations about the case disseminated through the media during the past four years.

PROCEDURE

[8] The matter of who may sit in the legislature is historically handled by the legislature itself. Here, the legislature has delegated specific powers to the Supreme Court. There is no procedure set out in the **Election Act** governing a hearing with respect to a controverted election. The **Act** simply provides that an application may be made to the Supreme Court for certain declarations, and that the evidence

must be given orally by witnesses rather than by affidavit. My function was to sit as an election court with specified powers rather than as a court with inherent jurisdiction.

[9] The early days of this hearing were consumed by motions regarding procedure. I decided a power to compel witnesses was necessary to properly determine the matter and issued various subpoenas upon application by counsel. I made a number of other rulings and the hearing proceeded, thanks to the efforts of all counsel, in a fairly orderly fashion.

[10] I am invited by the Chief Electoral Officer to set out my views on the procedural lacuna in the legislation, but this is a matter best left to the legislature.

STANDARD OF PROOF

[11] Counsel for the Respondents argue that the standard of proof in this case should be "beyond a reasonable doubt." They say this is a case of fraud, albeit not criminal fraud, with serious consequences to their clients. They cite a number of cases in favour of their position: *The Warrington Case* (1869), 1 O.M. & H. 42; *Ammeter v. Perrier*, [1999] 10 W.W.R. 725 (Man Q.B.), aff'd [2000] M.J. No. 71 (Man. C.A.); *Rex Ex Rel. Van Horne v. Grant* (1930), 37 O.W.N. 434, and many others including *R v. Rowe*, *ex parte Mainwaring* and others,

[1992] 4 All E.R. 821 at p. 829, referred to and relied on by our Court of Appeal in the earlier ruling in this case.

[12] The Petitioners say I am bound by **Bonneville v. Frazier** (7 March 2000), Prince George 09361, [2000] B.C.J. No. 480 (QL), 2000 (B.C.S.C.) 416, in which Mr. Justice Parrett, dealing with a petition to set aside a municipal election in McBride, B.C., based upon an allegation of "fraudulent means," said:

I find on a balance of probabilities and on the whole of the evidence that the document was intended to and did lead some voters to vote for a candidate they would not otherwise have voted for.

[13] No argument was addressed to Mr. Justice Parrett on the issue of the standard of proof. In view of the unique facts before him, it is clear that the application of a higher standard of proof would not have caused the result to change in any event. In other words, the issue was not of significance in **Bonneville**.

[14] Extensive argument has been addressed to me on this point. The case before me concerns the integrity of a provincial election, not a municipal election governed by the **Municipal Act**. Allegations of fraudulent conduct are made against the then Premier and the Minister of Finance going to

the very root of their fitness to hold public office. The consequences to the Respondents are that they may lose their jobs and to the voters in the three ridings that their expressed choice at the polls may be set aside. This is not a task to be undertaken on an evaluation of probabilities. Having considered all the cases in the context of the legislation and the issues before me, I am of the view that the standard of proof must be "beyond a reasonable doubt." However, I should note that the conclusions I have reached would not have been different even if the lesser standard of proof were used.

THE PETITIONERS' EVIDENCE

[15] Mr. Friesen says he was induced to vote for the NDP party candidate because of that party's statements of fiscal responsibility. He has no political affiliations and did not know who to vote for in the upcoming election, so he looked at the available information before making a decision. He read *The Province*, watched BCTV and CBC news, and listened to the radio. He recalls receiving campaign literature which said the budget was balanced, taxes were down, jobs were up. He saw Glen Clark "in advertisements discussing how he had balanced the budget and a full year ahead of schedule and how it was projected to be balanced in the coming year." He also

remembered reading about and seeing some news coverage of Elizabeth Cull's tabling of the budget in which she said the same things. He listened to the leaders' debate. If not for the NDP's statements about the balanced budget, he testified he would probably have voted Liberal. He said he learned later that the budget might not be balanced after all and felt his vote had been stolen from him.

[16] Ms. Umbarger has no political affiliations and had no leaning towards any particular party for the 1996 election. She planned to read all the news coverage and decide who would be best for British Columbia. She watched TV and read the *Trail Times*. She read *The Province* and *Vancouver Sun* newspapers as well as their websites. She also read the government website. On the day the election was called, she heard Glen Clark say the NDP had balanced the budget. She saw the "leadership debate" during the election campaign. She looked seriously at the balanced budget the NDP said they brought in for 1995-96. The NDP said they would bring in another balanced budget in 1996-97. This impressed her and she voted for Ed Conroy as a result. If the NDP had not said they had cleaned up the province's finances, she would have voted Reform, or possibly Liberal. When she later heard the budget would not be balanced, she felt cheated.

[17] Ms. Kuzenko has no political affiliations and also sought to inform herself for the 1996 election. She read the newspapers and watched the "leadership debates that went on before the election," which I take to be the leaders' debate, and not the campaign for the leadership of the NDP which had taken place earlier. She also received campaign literature from Mr. Bowbrick's office. Although other parties said they were going to work on a balanced budget, the NDP said they had already done it. Without that claim she would have voted for another party. When she learned that the budget was not balanced, she felt betrayed.

[18] All three Petitioners answered an advertisement in the paper for an organization called "HELP BC." They agreed to let their names stand as Petitioners. The petition was originally framed as a class action in which a declaration was sought against the NDP generally and against each elected NDP member of the legislative assembly. Through various pre-hearing rulings, the petition was reduced to its present scope - three Petitioners seeking to oust their respective MLA's on the basis that certain false statements were made on behalf of the NDP which caused the Petitioners to vote for the NDP candidate in their riding. The relevant paragraphs of the petition are annexed as Appendix 2.

BUDGET FIGURES

[19] I now turn to a brief overview of the budget process. Each budget for the upcoming fiscal year, when tabled, contains a revised forecast for the previous fiscal year. Despite being reported on at the end of the fiscal year, the previous year's budget is still only a forecast because it is prepared at a time when only ten months of actual figures are available. As well, the books do not close and the final figures are not known until the public accounts are published in September, several months after the end of the fiscal year. For example, the 1995-96 budget figures were not finalized until September of 1996.

[20] When the 1995-96 budget ("Budget 95") had been tabled in April of 1995, it had forecast a surplus of \$114 million. By the time the 1996-97 budget ("Budget 96") was tabled in April of 1996, the revised forecast for 1995-96 predicted a reduced surplus of \$16 million. When the public accounts finally closed in September of 1996, the final figure was a deficit of \$369 million. As for the 1996-97 budget, when it was tabled in April of 1996, a surplus of \$87 million was predicted. When the 1997-98 ("Budget 97") budget was tabled in April of 1997, the revised forecast for the 1996-97 budget was a

deficit of \$395 million. By the time of the public accounts in September of 1997, the deficit had reduced to \$353 million.

[21] Before either set of public accounts was published, however, the Petitioners had commenced this action in August of 1996. Although there was little if any evidence led as to what happened in the meantime, it appears that the Petitioners learned from various sources, I presume through the media, that Budget 95 was not balanced, or more accurately, was not expected to be balanced by the time the public accounts closed in September 1996. Excerpts from Hansard dated July of 1996 were filed which show dispute and debate in the legislature surrounding the budget arising from an announcement by Mr. Petter, then Minister of Finance, that the budget for 1995-96 might well show a deficit rather than a surplus because forest revenues would likely not be as high as originally predicted.

[22] What the Petitioners heard, if anything, about the 1996-97 budget was not clear. Only Ms. Umbarger specifically mentioned that she heard Mr. Petter say that the 1996-97 budget would not be balanced either, although she did not say when she heard this. There is no other evidence before the court on this point respecting Budget 96, other than the final figures for 1996-97 as set out above.

THE IMPUGNED REPRESENTATIONS

[23] The Respondents raised several arguments based on alleged deficiencies in the pleadings: they claim it is not clear who made the relevant statements, when they were made, what the statements were, and who is alleged to have heard them. These issues were further complicated by the position taken by counsel for the Petitioners - they argue that, despite the pre-trial motions which severely restricted the scope of the petition, this case is still about any voter in each of the three ridings who heard any representation by anyone on behalf of the NDP at any time in early 1996 until election day.

Who Made the Statements?

[24] It is true that the pleadings are not examples of clear plain drafting, and they were not amended after the scope of the petition changed substantially. The petition contains an allegation that Mr. Clark and the individual Respondents made certain statements as agents of the NDP. As well, the Petitioners allege in the petition that the makers of the statements knew the statements were false at the time they were made, and that they concealed information needed to ascertain the veracity of the statements. Despite the allegations in the petition, it was conceded at the outset of the hearing before me that the Respondents Hammell, Bowbrick

and Conroy did not make any statements relevant to the issues in the petition.

[25] Although a subpoena was issued at the request of the Petitioners for the person in charge of all NDP campaign promotional material, he was not called as a witness. There was no evidence adduced as to any statements respecting a balanced budget made by the NDP party through its literature or advertisements. The only campaign literature entered as an exhibit was put in by counsel for Ms. Hammell and Mr. Bowbrick. This was a widely distributed pamphlet which does not refer to a balanced budget. None of the television advertisements which were put into evidence mention a balanced budget.

[26] There is no evidence to show that either Ms. Cull or Mr. Clark were agents of the Respondents, nor does the petition, as I read it, allege that they were. The Respondents exercised no control over Ms. Cull or Mr. Clark and cannot be said to be in the position of a principal and thus responsible for anything Ms. Cull or Mr. Clark said as individuals. However, the petition says that "the NDP, through its leader Clark ... misrepresented a number of material facts in order to induce potential voters, including the Petitioners, to vote for candidates endorsed by the NDP." Mr. Clark testified

that, upon taking the role of leader of the party and Premier, he became the chief spokesman for the government and for the NDP. It is necessary, therefore, to examine the statements made by Mr. Clark on behalf of the NDP.

Timing

[27] The petition is based upon statements made "during the election campaign." The Respondents argue that they are required to deal only with statements made during "the period between when the writ for the election is issued and the date set for the return of that writ", or "the period between when the election is called and the close of general voting for the election" which are the **Election Act** definitions of "election period" and "campaign period" respectively. In this case, that would be April 30, 1996 to May 28, 1996.

[28] Mr. Clark made various speeches about the budget during his leadership campaign and in the period prior to the election being called. In March of 1996, he and Ms. Cull held a press conference at which he stated that they were on track for a balanced budget and expected to bring in a second balanced budget. As well, in April of 1996, the same message was contained in an infomercial. Mr. Clark agreed he had probably said the same things during the campaign period in a

television appearance on May 6, during the Leaders Debate on May 16, and during mini-debates on May 2 and 8.

[29] As for Ms. Cull, there was no evidence adduced of statements made by her during the election campaign respecting a balanced budget. Any statements made by her were made in her budget speech, and not during the election campaign. However, the budget speech was delivered the day the election was called.

[30] Notwithstanding the arguments addressed to the timing of the representations or who was an agent of whom, I cannot see that much turns on it, except to say that the Respondents were at some disadvantage to know exactly what statements they were required to deal with. The impugned representations about the budget were repeated during the election campaign by Mr. Clark, who admitted he spoke on behalf of the NDP.

[31] In the leadership debate on May 16, 1996, to which all three Petitioners listened, Mr. Clark said:

I brought in a budget which takes action, which cuts your taxes, which cuts small business taxes, which brings the rate of debt down, the overall debt of the province, and which tries to deal with your priorities and your concerns in an affordable way with a balanced budget. You know we took the province from a huge deficit when we took office now to the surplus budget and I think the real challenge when we move forward is that it is still continuing to come down.

[32] This statement obviously refers to Budget 95 as being a surplus budget, and also refers to the budget brought in by Mr. Clark for 1996-97 as balanced. Ms. Cull, in her budget speech made the day the election was called, had characterized Budget 96 as "the second consecutive surplus budget." I accept that there was a representation made by Mr. Clark during the election campaign that the 1995-96 and 1996-97 budgets were balanced or surplus.

[33] There were several other comments in the same vein attributed to Mr. Clark to which objection was taken on the basis that they had not been particularized or otherwise provided to the Respondents. The Petitioners argued strenuously that everything had been provided. Apparently much of the material was contained in many hours of videotape which was produced during the hearing and which counsel for the Respondents say they did not have time to listen to. As the statement above is sufficient to allow consideration of the issues, I need not address the issue of timing and adequacy of disclosure.

Reliance on the representations

[34] The Respondents argue that, by the terms of the petition, they are required to deal only with representations that were heard by the Petitioners themselves during the election

campaign. Despite the potential to bring a petition based upon the reaction of voters other than the Petitioners (as was done in *Bonneville v. Frazier*, referred to earlier), this petition in its present form concerns itself with the three Petitioners only. Although paragraph 46 refers to "potential voters, including the Petitioners", this wording remains from the time when the Petitioners hoped the petition would be a class action. That hope did not materialize. I will address myself only to the evidence of the Petitioners as I cannot speculate upon what other voters might have heard and done.

[35] As vague as the Petitioners' evidence is as to what they heard and when, both Ms. Umbarger and Mr. Friesen said they heard Mr. Clark say Budget 95 was balanced and the next one was expected to be balanced. Ms. Kuzenko said "the NDP" said they had a balanced budget and were expecting to balance the budget in the upcoming year. All three Petitioners said they listened to the leadership debate. Therefore, I proceed on the basis that each Petitioner heard Mr. Clark say, during the election campaign, that the NDP had balanced the budget and expected the upcoming budget to be balanced. Each Petitioner testified that they voted for the NDP candidate in their riding on the strength of that, and would not have voted for them otherwise.

DISCUSSION

[36] The Petitioners argue that the entire process by which the figures for both the revised 1995-96 forecast and the 1996-97 budget were arrived at should be scrutinized together. They contend that the NDP had put itself into the position of living up to an unrealistic Debt Management Plan in the face of a downturn in the economy. As a result, Mr. Clark and Ms. Cull involved themselves in a fraudulent process of orchestrating the figures for both the 1995-96 revised forecast and the 1996-97 budget, thus creating a knowingly false and misleading impression of fiscal prudence designed to get votes. Notwithstanding this general theory, there are particular instances of alleged wrongdoing which are specific to the individual budgets, so for the sake of clarity and organization I will consider them separately.

Budget 95

[37] In respect of the revised forecast for 1995-96, the Petitioners submit that Ms. Cull and Mr. Clark upon realizing that the surplus that had been predicted in March of 1995 was not going to materialize, picked some numbers which might have a veneer of credibility and worked the budget assumptions back to conform with them. In doing so, they ignored the professional advice of Treasury Board Staff and forced the

staff to come up with unrealistic options. The Staff were so reluctant to do this, according to the Petitioners, that they insisted Ms. Cull sign off on the options statement herself, an unprecedented move. The unhappy reaction of some of Treasury Board staff to Ms. Cull's decisions was clearly evident through the testimony of Mr. Foster, chief of fiscal forecasting for the Treasury Board.

[38] When all the evidence had been heard, there were some difficulties with this theory. First, the evidence demonstrated that Mr. Clark had little if any knowledge of the 1995-96 budget. Ms. Eaton, Secretary to Treasury Board, said she believed it might have been mentioned in passing at a meeting she had with him in December of 1995 when the possibility of his becoming leader of the party arose, but that the entire focus of the meeting was on Budget 96. Ms. Cull said Budget 95 was never discussed with Mr. Clark.

[39] Mr. Clark, who had assumed leadership of the NDP party in February of 1996 when Mr. Harcourt stepped down, said he knew nothing about the 1995-96 budget other than what he was told by Ms. Cull, which is that it was balanced. Aside from Ms. Eaton's belief that there was a passing reference to that budget in the December 1995 meeting, there was no evidence to the contrary.

[40] The responsibility for the revised forecast for Budget 95, then, rests with Ms. Cull and it was clear from her testimony that she accepted the entire responsibility for both budgets. Despite the alleged misrepresentations not having been made by Ms. Cull, she was the source of Mr. Clark's information. Therefore an examination of her evidence is necessary. Did Ms. Cull, on her own initiative, contrive a revised forecast for Budget 95 in order to trick the voters of British Columbia, by fraudulent means, into voting for the NDP?

Revenue Optimism

[41] The essence of the Petitioners' case respecting the 1995-96 revised forecast is a document entitled "Ministry of Finance and Corporate Relations Briefing Note" dated March 25, 1996. By March of 1996, Ms. Cull was in the final stages of preparing the 1996-97 Budget to be presented to the Legislature. This budget would include the revised forecast for the 1995-96 fiscal year for which a surplus of \$114 million had been predicted the previous March.

[42] Ms. Cull testified that a budget is a forecast only and is made up of three elements - the fiscal target which is set first, and then the revenues and expenditures which are managed throughout the year to enable the fiscal target to be

reached. She said there are always two budgets going on at any one time. The first is the budget for the current fiscal year which the Minister of Finance actively manages throughout the year, and the second is the budget for the upcoming year which is being prepared for throughout the year.

[43] Mr. Harcourt had promised to balance the budget over the business cycle which Ms. Cull interpreted to be by 1996. The deficit came down faster than she had foreseen so she announced in the budget speech in March of 1995 that the budget would be balanced in 1995, and there would be a surplus of \$114 million.

[44] Throughout 1995 she continued to operate on the assumption that the budget would be balanced and that she would manage revenues and expenditures to ensure that the fiscal target would be reached, despite the unanticipated loss shortly after the budget was tabled of \$250 million in downstream benefits from the Columbia River Treaty. Ms. Eaton, who, as Secretary, reported directly to Ms. Cull, said Ms. Cull was open, friendly and approachable and often met directly with the staff for briefings. Ms. Eaton testified that Ms. Cull was sensitive to changes and would try to get things back on course. She would ask for advice from staff about reducing expenditures if revenues were down.

[45] Ms. Cull received monthly reports from the staff which monitored the entire economic situation. These reports showed a range of forecasts, one of which was a surplus, although the "most likely" staff forecast was consistently pointing to a deficit. Ms. Cull, however, testified that those staff forecasts contained expenditures that she knew would not be made and incorrect revenue assumptions. As well, she said that expenditures are heaviest in the first four or five months of the fiscal year while most of the revenue tends to come in at the end. Her analysis of the monthly reports was that they were on target up to December of 1995. Ms. Eaton agreed that the monthly reports showed improvement through to November of 1995.

[46] In early 1996, Ms. Cull decided the government would not be able to achieve the original forecasted surplus of \$114 million and revised it downwards. She and caucus still operated under the assumption that the 1995-96 budget would be balanced. She said that she had tabled a balanced budget and her job was to maintain it.

[47] The uncontradicted and unchallenged evidence of Ms. Cull was that that the B.C. economy is very difficult to predict, particularly those aspects based on commodities such as forestry which are very volatile at year end. Ms. Eaton also

agreed that forestry revenues can swing by hundreds of millions of dollars at year end. Ms. Cull's staff had been instructed by her to be conservative in their forecasts so that any risk to be borne would be by her alone, and her experience with the staff forecasts had shown her instructions were borne out.

[48] Ms. Cull testified that "revenue optimism" was a shorthand phrase used by her staff, which she came to understand and use herself, to denote the complex concept of ranges of comfort associated with revenue projections. Both Ms. Cull and Ms. Eaton testified that the \$275 million worth of "optimism" put into Budget 95 by Ms. Cull in March of 1995 did in fact materialize.

[49] Sometime in the weeks prior to the presentation of Budget 96, Ms. Cull had to decide upon the final figures to include for a revised forecast for 1995-96. The Petitioners submit that the "revenue optimism" inserted by Ms. Cull into the revised forecast at this time was unwarranted and could not be justified that late in the budget preparations. As of January 1996, Ms. Cull's staff was predicting a deficit for the 1995-96 fiscal year, rather than a surplus. However, Ms. Cull testified that she had knowledge not available to the staff of expenditure pressures that would not come about. As well,

although the decisions were being made in the tenth month of a twelve month cycle, there were many ways available to her at that point to cut expenditures and save significant money. Ms. Eaton confirmed that there can be quite a lot of variation between January and March in any given year.

[50] Given these factors, in February of 1996, Ms. Cull asked her staff, through Ms. Eaton, to prepare the March 25, 1996 briefing note. It contained a chart which showed Ms. Cull how the staff predictions for revenue and expenditures as of January of a given year compared to the final revenue figures from the public accounts. In the previous three years, the staff January forecasts had underestimated revenues by \$188.5 million, \$318.8 million and \$310.3 million respectively. Mr. Foster and Ms. Eaton agreed that the underestimation between the original revenue figures contained in the budgets as tabled in March of those years and the public accounts figures was even higher, reaching \$800 million in 1994-95.

[51] Starting from this information, various options for revenue assumptions were put to Ms. Cull in writing so that she could decide upon a number for the revised 1995-96 forecast. Ms. Cull testified that, although discussions of this type had taken place in previous years, this particular exercise was done in writing at the suggestion of Ms. Eaton.

Ms. Cull said she was the only person accountable for the figures and the decision had to be hers alone, which is why she signed on the decision lines for each option, after full discussion with Ms. Eaton. Options were presented for various assumptions underlying revenue figures for personal income tax, miscellaneous revenue, forests (unbilled scale), BCBC dividends, and year-end expenditure lapse.

[52] For personal income tax, Ms. Cull selected an option based upon the staff forecast underestimation for this source of revenue in the two previous years. For miscellaneous revenue, of the options presented, Ms. Cull selected a middle option based upon the average underestimation by staff in the last four years. For both BCBC dividends and year-end expenditure lapse, Ms. Cull accepted the current staff forecast.

[53] The Petitioners place particular reliance on Ms. Cull's choice of figures for forest revenue. The staff note preceding the options choice reads:

Over the last four years, the January forests revenue forecast has ranged from an overestimate of \$15 million to an underestimate of \$166 million. Most of the change is due to volatility in the estimated value of unbilled scale at year end (i.e. the amount of timber cut and scaled, but not billed by year end).

The current 1995-96 forecast [the staff forecast] assumes that volume of unbilled scale for the year will be unchanged from 1994-95, but that average stumpage rates will be lower. Thus the value of unbilled scale will be lower than last year.

There was an increase in volumes harvested in the first half of 1995-96, indicating that the volume and value of unbilled scale could be higher.

[54] Ms. Cull was then presented with the option of (1) accepting the current staff forecast, (2) raising the current forecast by up to \$165 million, equal to the previous year's underestimate, or (3) raising it by \$65 million, equal to the average underestimate for the last four years. Instead of choosing one of these options, Ms. Cull wrote "None of the above. Since it has been increasing every year in last 4, I'd be more comfortable with something around \$100 M."

[55] Ms. Cull testified that she and her staff were aware of the problems surrounding forest revenue by this time. She had received a memorandum from Mr. Petter, then Minister of Forests, in December of 1995 in which he informed her, in respect of the Small Business Enterprise Program, that recent information "indicates a significant shortfall in revenue from the 1995-96 forecast due to less harvesting and billed volumes than forecast." Ms. Cull said she referred this information to her staff to investigate and report on it. It was factored

into the staff's monthly report of February 20, 1996 and into the base upon which the options were built.

[56] However, she said she now knows, using twenty-twenty hindsight, that her Ministry did not understand what was happening with forest revenues, as they assumed there would be a year-end spike as there had been every other year. As well, the Ministry of Forests had moved to another system which Finance did not know about until July of 1996, and this resulted in certain revenue being wrongly estimated. This evidence was not expanded upon in examination in chief or in cross-examination.

[57] With respect to the "options briefing note," the only evidence before the court is that various assumptions were used, figures were arrived at, and Ms. Cull made her choices. There is no evidence that Ms. Cull instructed anyone on her staff to manipulate or juggle figures.

[58] As a result of her selections and decisions from the options briefing note, Ms. Cull added "optimism" of about \$156 million to the most optimistic staff forecast, and had her staff prepare the revised forecast for 1995-96 to be included in Budget 96. The revised forecast showed a surplus of \$16 million. Ms. Cull testified that she felt very comfortable in putting that figure into the budget in the full belief it

would be realized as she had based it upon all the information available to her and upon reasonable assumptions. When the public accounts were published, the forecast ultimately had an error factor of 2.4%, compared to the historically acceptable rate testified to by Ms. Eaton of plus/minus 4%.

[59] The Petitioners refer to a page of hand-written notes from Lois McNabb, Director of Fiscal and Economic Analysis for Treasury Board at the relevant time. Mr. Foster and Mr. Lawless reported to Ms. McNabb; Ms. McNabb reported to Ms. Eaton. The page of notes is dated April 14, 1996 and contains the words "rev - needed \$156m of optimism." It is argued that this piece of evidence is "totally damning" to Ms. Cull because it shows that Ms. Cull had pre-determined the surplus figure of \$16 million and forced the staff to use "grossly unrealistic" figures to get to that amount. However, Ms. Cull's options decision had been made in March and, according to the uncontradicted evidence, the budget would have already gone to the Queen's Printer by April 14, 1996. Neither Ms. Eaton nor Ms. Cull had seen Ms. McNabb's handwritten notes before. I am unable to draw any damning conclusion from this document.

Were "fraudulent means" used to obtain votes?

[60] The Petitioners argue, however, that regardless of the process Ms. Cull used to reach her figures, she could not say the 1995-96 budget was balanced in April of 1996 when she knew the public accounts would not be published until September of 1996. To state as a fact something you know cannot be ascertained until a future date is, the petitioners submit, a misrepresentation. Moreover, they say Ms. Cull could not refer in the budget speech to spending surplus money when a surplus was eventually shown not to have existed. None of the Petitioners referred to the latter point as a representation relied upon by them, nor was it put to Ms. Cull when she was on the witness stand to allow her to respond.

[61] Nevertheless, this argument gives rise to the fundamental difficulty with this case - to understand very basically what a government budget is, how it is developed, and what Ms. Cull did with it required many days of intensive examination of witnesses and the introduction of numerous documents. I have referred to only a few documents, those which the Petitioners allege are particularly significant, and have only briefly touched on some of the considerations testified to by the witnesses. The theory of the Petitioners is, however, that a budget is a simple concept understood by everyone. Either it

is balanced or it is not. Especially in an election year, the government must be scrupulously careful with any statements it makes respecting its budget. If the government is wrong in claiming a balanced or surplus budget, no matter by how little, the government has obtained votes by fraudulent means (assuming that it was this factor that caused a change in vote).

[62] This simplistic approach has its appeal but it is not appropriate when the decision to be made is whether the Petitioners have proven that the Respondents or someone on their behalf acted fraudulently within the meaning of section 256 of the **Act**. The best that can be done, even in an election year, is that the Minister of Finance, in this case Ms. Cull, make her decisions honestly and reasonably. I found Ms. Cull to be an honest, careful, articulate and well-informed witness. I accept that she believed that her assumptions were reasonable and that she was honest in her belief that the 1995-96 budget was balanced. She was ultimately wrong but she was not fraudulent.

[63] As mentioned earlier, the evidence demonstrated that Mr. Clark played no role in setting the figures for the revised forecast. He testified that he was busy during the early part of 1996 with the leadership campaign. He was briefed on the

1996-97 budget in February and March but had no input into and received no information about the 1995-96 revised forecast. He testified that he was told by Ms. Cull that the 1995-96 budget was balanced and agreed he wanted a balanced budget. He said he believed the budget was balanced and he campaigned on it.

[64] I have found that Ms. Cull's beliefs were honest and reasonable. On the evidence before me, Mr. Clark had no other source of information available to him and accepted her statements. He then made the public statement that the 1995-96 budget was balanced. The statement was not known to be false nor was it made without regard to its truth or falsity. In all of these circumstances I am unable to find that the representation that the budget for 1995-96 was balanced constitutes "fraudulent means" within the meaning of section 256 of the **Act**.

[65] If the voters in British Columbia accept the general characterization of the situation advanced by the Petitioners, that is a matter they can consider when they next come to vote, but the circumstances here do not give rise to a legal remedy.

Budget 96

[66] The Respondents take the position, relying on the Court of Appeal's earlier judgment in this case, that statements of intent or belief do not constitute "fraudulent means" within the meaning of section 256 of the **Election Act**. A budget is a prediction about the future, or an estimation as to future expenses and revenues. Whether the ultimate fiscal target will be reached depends upon the effectiveness of the monitoring program during the year and various decisions that will be made throughout the year to cut expenditures or find more sources of revenue. Therefore the Respondents contend that the provisions of section 256 can not apply to statements made about the 1996-97 budget, 18 months before the final figures for that budget would be known.

[67] The Petitioners' theory with respect to the 1996-97 budget, as argued by their counsel, is that there is an "inescapable inference" that the Premier's office put together a revenue forecast and called Ms. Cull to a meeting with Mr. Clark and Mr. Gunton (who was not called as a witness). At this meeting, according to the Petitioners, Ms. Cull was reluctantly persuaded to incorporate grossly unrealistic and dishonest figures into the budget by a promise of access to the Forest Renewal B.C. funds if she complied.

[68] Alternatively, and more in keeping with the evidence that actually emerged during the hearing, I take the Petitioners' argument to be that Ms. Cull, as Finance Minister, did not tell the public that, although she was confident that the assumptions upon which that budget was based were reasonable, she had had to rely on information from sources whom she considered to be better informed than she was about the state of negotiations of the softwood lumber deal with the United States. Although she accepted the advice as knowledgeable, she was not completely comfortable with the probability of those assumptions so she had established a back-up or contingency plan to use alternate sources of revenue if the assumptions did not materialize. One of the sources she wished to use, if other contingency plans did not materialize, was the Forest Renewal B.C. funds. Counsel for the Petitioners argues that the public should have known this background. None of the Petitioners themselves testified that this was significant to them, and Ms. Umbarger, the only Petitioner who mentioned hearing at some later time that the 1996-97 budget would not be balanced, agreed that that budget had not yet happened and there might be a reason, such as declining revenues, why it did not eventually balance.

State of the Economy

[69] The Petitioners rely upon a briefing note dated March 8, 1996 headed "Economy Tanks in Fourth Quarter: 1996 Forecast at Risk." This was prepared for Brenda Eaton by Mr. Lawless, the chief economist. Mr. Lawless was concerned that there was a major deterioration in the British Columbia economy during the last part of 1995. Notwithstanding his concerns, however, Mr. Lawless retained the 2.7% Gross Domestic Product growth rate upon which the forecast for the budget was based. Ms. Eaton replied that she believed the cautions contained in his memo were well understood and documented and she was moving into budget production mode. The memo was not forwarded to Ms. Cull. Ms. Eaton testified this was because she felt the weaknesses in the economy had been thoroughly dealt with in the February monthly report and in verbal briefings. Ms. Cull testified that she received mixed signals about the state of the economy by the end of the third quarter. For instance, the February monthly report stated that lumber and natural gas prices had risen sharply, but the price of pulp had decreased. Generally, she was informed that the staff maintained the 2.7% growth rate, and moderate growth was expected in the final quarter.

Alternate Revenue Forecast

[70] During the period between Mr. Harcourt announcing in November of 1995 that he would be stepping down and Mr. Clark taking over as leader of the NDP in February 1996, a committee of deputy ministers was formed to prepare transition plans for the new premier. Three of them became known informally as the Fiscal Budget Steering Committee, whose task was to focus on the revenue forecast for 1996-97. This committee consisted of Brenda Eaton, Tom Gunton (Deputy Minister of Environment and Parks), and Doug McArthur (Deputy Minister to the Premier), although Mr. McArthur attended only one meeting.

[71] During January and February, Ms. Eaton and Mr. Gunton put together an Alternate Revenue Forecast, with various scenarios based on commodity price changes. Ms. Eaton testified that the assumptions underlying this forecast were primarily Mr. Gunton's; the information regarding the softwood lumber negotiations came from Mr. McArthur, who was the chief negotiator. This revenue forecast was about \$850 million higher than the staff forecast.

[72] Ms. Cull and Ms. Eaton met with Mr. Clark twice to discuss this forecast. At the first meeting in February, Ms. Cull told Mr. Clark she was not comfortable with the figures as she felt they were too optimistic. She testified the

figures were about \$400 million higher than the forecast she considered to be reasonable. At that point, based on the knowledge she had about revenues and expenditures that was not available to the staff, Ms. Cull was comfortable with a figure about \$250 million higher than the staff forecast. Ms. Cull obtained further information about the assumptions that had gone into the alternate forecast. She learned that Mr. McArthur, who was involved in the softwood lumber negotiations, was of the view that the revenue projections based on higher lumber prices were reasonable. She was willing to accept his opinion, but wanted a back-up or contingency plan beyond the normal expenditure and revenue controls should the numbers not materialize since she was the person who would be politically accountable at the end of the day.

[73] Ms. Cull testified that during her consideration of the appropriate figures, she was concerned about the social consequences of picking too conservative a revenue forecast, which would mean unnecessary cuts to education and health care. This was unacceptable to her as a social democrat. Ms. Eaton confirmed that Ms. Cull had voiced these concerns to her, but did not agree that Ms. Cull had told her that certain

government policies had been held back in the two previous years because of underestimation of revenue.

Alternate Revenue Sources

[74] Ms. Cull and Ms. Eaton both testified that they put together a list of alternate revenue sources and met with Mr. Clark to discuss the concept. According to Ms. Eaton, the most significant source discussed was Forest Renewal B.C., which was running a substantial surplus. Ms. Eaton was aware there would be difficulties in accessing this money but did not know what they were.

[75] Ms. Cull could not recall how much of the list of alternate revenue sources was discussed with Mr. Clark but she sought assurances from him on a number of contingency options. One of them was Forest Renewal B.C. She said Mr. Clark assured her that that was one of the options that would be available if the forecast did not come about and if the other contingency measures were insufficient. No decision was made on whether the Forest Renewal funds would be used because there was no evidence that revenue would be required. She said the decision as to the budget revenue figures was hers alone, not Mr Clark's.

[76] Ms. Cull testified that Mr. Clark never instructed her that they had to have a balanced budget but there was a clear expectation from both Mr. Harcourt and Mr. Clark that it was her job to balance both the 1995-96 budget and future budgets. No one ever told her she had to bring in a surplus budget regardless of the facts. Mr. Clark said he may have told Ms. Cull he wanted a balanced budget, although he did not think he had. He agreed that he did want one as it was good public policy. He said he and Ms. Cull discussed the Alternate Revenue Forecast, although he said he did not know where that forecast had come from. He said he had not discussed the budget figures with Mr. Gunton or with Mr. McArthur, nor did the Fiscal Budget Steering Committee report to him.

[77] Mr. Clark agreed that he and Ms. Cull talked about four or five potential revenue sources which Ms. Cull had in mind if there were any problems down the road, given the conflicting signs in the economy. While they did not think there would be any problems, these options, including Forest Renewal B.C., were available for consideration. He did not authorize Ms. Cull to use the funds, but said if necessary, they would revisit the issue. He denied that he sought to have Ms. Cull go above her own comfort level by telling her

she could use these funds, and said the budget figures were her decision alone.

[78] Although the significance of the dispute over the Forest Renewal funds was not made clear during the evidence, it appears that, as Minister of Finance, Ms. Cull had argued strenuously for a cap on these funds, with the surplus to flow into general revenue. Mr. Clark said that Mr. Harcourt had decided the funds should go back into forestry and not into general revenue, a policy with which Mr. Clark agreed, but there was no legal prohibition to using them; it was a legitimate option.

[79] Much argument was directed at whether Ms. Cull and Mr. Clark contradicted each other in such a way as to throw doubt on the credibility of each. The difference between them seems to be in the level of assurance Ms. Cull took as to the availability of the Forest Renewal funds - Ms. Cull said that, although no decision was made to use the funds, she was assured they would be available to her if the forecast and other contingency funds did not materialize, and Mr. Clark said he agreed to revisit the availability of these funds in those circumstances. Both agreed that the list of alternative sources of revenue came from Ms. Cull. Nothing Ms. Eaton said contradicted this. I can draw no conclusions adverse to the

credibility of Ms. Cull or Mr. Clark from this evidence, nor can I find in the evidence any support for the proposition that Ms. Cull was forced by Mr. Clark to accept figures which she knew were unreasonable and unattainable.

[80] What is more important, according to the Petitioners' argument, is that the public was not told that the finance minister had contingency plans, should the forecast not materialize. Not to have revealed this, it is contended, resulted in votes being obtained through fraudulent means because it shows Ms. Cull had no faith in her forecast. However, I note that none of the Petitioners mentioned this lack of disclosure as a significant factor in their realization that they had been "defrauded" of their vote.

[81] Ms. Cull said she did not mention the contingency plan because it was no different from the contingency plans she had had in any previous year, and all the assumptions and optimism were included in the public budget document. She assumed she would be able to manage the budget to reach the fiscal target as she had previously. When faced with the cut in downstream benefits in early 1995, for example, she had immediately cut expenditures by \$300 million. In a previous year, she had been able to cut expenditures in excess of \$500 million when federal income tax numbers had turned out to be wrong. All

that is before me is the fact that, after eighteen months during which the budget was managed by another Minister of Finance, Ms. Cull having been defeated in the 1996 election, there was a deficit amounting to 2% of the total budget. Whether Ms. Cull could have managed the revenues and expenditures adequately, or whether she would ever have had to use any contingency plans will never be known.

The Final Figures

[82] Ms. Cull testified that after receiving all of the above information, considering all the forecasts in front of her, including the staff forecast and the Alternate Revenue Forecast, she established the assumptions she felt were reasonable and that she was comfortable with, using her best judgment. Her staff then prepared the budget which was published in "Budget 96." The final revenue figure in the budget was \$20,659,000,000, as opposed to the alternate revenue forecast of \$20,785,000,000 and the staff forecast of \$19,948,000,000. The petitioners point out that despite a lower total revenue figure than the Alternate Revenue Forecast, Ms. Cull's figure for forestry revenue was \$100 million higher. Ms. Cull testified that it is not appropriate to compare her figures to a particular forecast; she built her

forecast as she always had, based on all the information available to her.

[83] Ms. Cull testified that she did not accept her staff forecast for a number of reasons: she knew it was conservative, as she had instructed her staff to be conservative in their forecasts; the two previous budgets had underestimated revenues by \$500 million and \$800 million; she had information on revenue and expenditure decisions her staff did not have; underestimating revenues and cutting programs unnecessarily was not acceptable to her; she was politically accountable and her staff was not - she would never blindly take her staff's figures and live or die by the consequences. She said she believed her forecast was reasonable and was based on reasonable assumptions, and she believed the budget was balanced.

Timing of the Election

[84] It is the theory of the Petitioners that the election was called the same day the budget was tabled to forestall the formal budget debate in the legislature. The budget would normally have been delivered at the end of March but was delayed until the end of April. Ms. Cull testified that she presented "Budget 96" on the morning of the day made available to her by the Premier. She tabled the comptroller general's

report of interim financial statements for the ten-month period ending January 31, 1996, the Budget Reports, the Estimates, and the pertinent legislation. It was her recollection that the budget was delayed because the House was not sitting and a decision had been made not to recall it. Mr. Clark dropped the writ that afternoon. She was not involved in the choice of dates.

[85] Mr. Clark testified that he had to call an election sometime within eight months of the time he actually called it, and the decision to do so was made on about April 25th. He said that the budget was thoroughly debated during the election and there is no significance to the fact that the formal budget debate did not take place. He described the eight day budget debate to be somewhat ritualistic, with the real debate on the estimates taking place later, which would mean he would not have been able to call an election until July or August. He said he called the election at the same time as presenting the budget so that he could show British Columbians what he had actually done, not what he was just promising to do, expecting all of his plans and announcements to withstand public scrutiny. He agreed that he said, in an infomercial, that the NDP was going to balance the budget

again next year, and that he absolutely believed that to be true.

Were "fraudulent means" used?

[86] Putting all of this together, then, the Petitioners say the Premier's office forced Ms. Cull to accept the Alternate Revenue Forecast despite her level of discomfort with it, and forced her to incorporate it, or something close to it, into Budget 96. According to the Petitioners' analysis of the evidence, either Mr. Clark is to be believed and Ms. Cull had no back-up plan and was therefore dishonest in using those numbers, or Ms. Cull is to be believed and there was a back-up plan which should have been disclosed to the electorate.

[87] If the Petitioners could actually prove that there was a conspiracy between Mr. Clark and/or his advisors and/or Ms. Cull to insert grossly exaggerated numbers into this budget, ones which they knew could never materialize, they might overcome the hurdle placed in their way by the Court of Appeal - that is, that statements of intention or belief cannot constitute "fraudulent means."

[88] In order to come to the conclusion that Ms. Cull was forced by Mr. Clark to put forward a fraudulent budget, I would have to ignore the evidence, assume both Mr. Clark and

Ms. Cull lied throughout the entire process and reject everything they said on principle. Then, without any evidence to support the Petitioners' theory, I would nevertheless have to make the findings of fact they wish me to make based on the simple proposition that if Mr. Clark or Ms. Cull testified to something, the opposite must be true. This would not be an appropriate exercise of my function.

[89] I am unable to conclude, based on the evidence, that there was any such conspiracy and that Ms. Cull's beliefs in the projections contained in Budget 96 were anything other than her best judgment in the circumstances. The decisions were hers alone to make; the assumptions she used and projections she reached were available to the public. The existence of the contingency plan, on the evidence before me, shows caution rather than deceit. As with Budget 95, the fact that Ms. Cull's forecast was ultimately shown to be wrong does not make her statements fraudulent.

[90] As well, as there is no evidence to support the theory of a conspiracy, the Petitioners are met with the valid argument that statements made about this budget in May of 1996 could only be statements of intention and belief. They cannot be "fraudulent means," and even Ms. Umbarger seemed prepared to concede during cross-examination that she could accept there

might be an explanation for discrepancies in a budget for a year that had not yet occurred.

[91] As for the Debt Management Plan, it was a long-range plan to reduce the debt, with targets related to credit ratings, formulated on the advice of business and labour leaders. It did not have specific figures attached to it and, according to Ms. Eaton, played little if any part in the internal decisions made by Treasury Board staff or by Ms. Cull, providing only a broad reference point. I heard no evidence showing that it would have placed pressure upon Ms. Cull to make any particular decision.

CONCLUSION

[92] The Petitioners concede that the Respondents did not personally contravene section 256 of the **Act**. No breach of section 256 by Ms. Cull or Mr. Clark on behalf of the NDP has been proven. The petition is dismissed.

[93] In view of the conclusion I have reached, there is no need to consider the interesting arguments advanced under section 151 of the **Act** as to whether the breach materially affected the election and who would bear the onus on that issue.

[94] I am indebted to all counsel for their thorough and helpful arguments.

[95] If there is a need to speak to costs, counsel may arrange to do so through the Registry.

M. Humphreys

APPENDIX 1

THE STATUTE

Statutory SectionsElection Act, R.S.B.C. 1996, c. 106

150 (1) The right of an elected candidate to take office or the validity of an election may not be challenged except by an application under this section.

(2) An application may be made in accordance with this section to the Supreme Court for a declaration regarding the right of an individual to take office or the validity of an election.

...

(4) An application may be made only by a candidate in the election, the chief electoral officer or a voter for the electoral district for which the election was held.

(5) An application may be made only on one or more of the following bases:

- (a) that a candidate declared elected was not qualified to hold office at the time he or she was elected;
- (b) that an election should be declared invalid because it was not conducted in accordance with this Act or a regulation under this Act;
- (c) that an election should be declared invalid because section 255, 256, 257 or 258 was contravened.

...

(10) If the application is based on a claim that section 255, 256 or 258 was contravened, the evidence regarding that claim must be given orally by witnesses rather than by affidavit.

151 (1) On the hearing of an application, the court may do any of the following:

...

- (c) declare that an election is confirmed as valid;
- (d) declare that an election is invalid and that the office is vacant.

(2) The court must not declare an election invalid by reason only of an irregularity or a contravention of this Act or a regulation under this Act if the court is satisfied that

- (a) the election was conducted in good faith and in accordance with the principles of this Act, and
- (b) the irregularity or contravention did not materially affect the result of the election.

(3) The court may confirm the election of a candidate in relation to which the court finds there was a contravention of section 255, 256, 257 or 258 if the court is satisfied that

- (a) the candidate did not contravene the applicable section, and
- (b) the contravention did not materially affect the result of the election.

256 (2) An individual or organization must not, by abduction, duress or fraudulent means, do any of the following:

- (a) impede, prevent or otherwise interfere with an individual's right to vote;
- (b) compel, persuade or otherwise cause an individual to vote or refrain from voting;
- (c) compel, persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate or for a candidate of a particular political party.

APPENDIX 2

THE PETITION

[96] The Petitioners apply to this court for orders that:

- b. The election of New Democratic Party candidate, Sue Hammell, in the electoral district of Surrey - Green Timbers in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- d. The election of New Democratic Party candidate, Graeme Bowbrick, in the electoral district of New Westminster in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.
- i. The election of New Democratic Party candidate, Ed Conroy, in the electoral district of Rossland-Trail in the general provincial election of May 28, 1996, be declared invalid and that the office be vacated as a consequence of the Respondents' violation of section 256(2)(c) of the Election Act of the Province of British Columbia and pursuant to the powers and provisions of sections 150 and 151 of the said Election Act.

[97] The facts upon which this petition is based are as follows:

1. The Petitioner, Leonard Friesen ("Friesen"), resides in the electoral district of Surrey-Green Timbers, British Columbia.
2. The Petitioner, Holly Kuzenko ("Kuzenko"), resides in the electoral district of New Westminster, British Columbia.
3. The Petitioner, Mildred Umbarger ("Umbarger"), resides in the electoral district of Rossland-Trail, British Columbia.
4. The Petitioners, Friesen, Kuzenko and Umbarger, ... voted in the general provincial election held on May 28, 1996 and are aggrieved as a result of the misrepresentations of the Respondents, their servants and agents as hereinafter particularized.
5. The Respondent, Sue Hammell ("Hammell"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Surrey-Green Timbers in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
7. The Respondent, Graeme Bowbrick ("Bowbrick"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of New Westminster in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.
12. The Respondent, Ed Conroy ("Conroy"), was elected as a Member of the Legislative Assembly of the Province of British Columbia in the electoral district of Rossland-Trail, in the general provincial election held on May 28, 1996 and was a member of and a candidate endorsed by the New Democratic Party of British Columbia.

46. During the election campaign preceding the provincial general election held on May 28, 1996 up to and including the election day the N.D.P., through its leader Clark, its agents and its endorsed candidates, including the individual M.L.A. Respondents, and the agents of the endorsed candidates, by diverse methods and on diverse occasions misrepresented a number of material facts in order to induce potential voters, including the Petitioners, to vote for candidates endorsed by the Respondent, New Democratic Party.
47. In particular the misrepresentations made by the Respondents to fraudulently persuade the Petitioners and other members of the electorate to vote for the candidates endorsed by the Respondent, New Democratic Party, include the following:
- a. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1995-96 fiscal year was in surplus;
 - b. that the Government of British Columbia during the term of office preceding the general election of May 28, 1996, had been fiscally prudent and as a result the budget of the Government for the 1996-97 fiscal year would be in surplus, and
 - c. that as a further consequence of such fiscal prudence the Government of British Columbia was able to afford a capital development program in an amount of \$250,000,000 to improve the Province's infrastructure, including schools, transport and other facilities.
48. The statements particularized in the preceding paragraph were false and known to be false at the time they were made and the Respondents' further concealed the information required to

ascertain the veracity or lack thereof of the misrepresentations.

49. The nature of the information contained in the misrepresentations is of such a kind that the N.D.P. and the candidates endorsed by it knew that some or all of the misrepresentations were false and further, the said parties disseminated such false information for the purpose of inducing the members of the electorate to vote for the candidates endorsed by the N.D.P., knowing that such misrepresentations were central to the concerns of the voters. By doing so the Respondents contravened the Election Act by inducing or causing an individual to vote, by fraudulent means within the meaning of section 256(2) of the Election Act, to elect the candidates endorsed by the N.D.P..
50. In the alternative to paragraphs 48 above, if the N.D.P., and its endorsed candidates, did not actually know whether the misrepresentations were true or false, then they were wilfully blind to or indifferent to the truth of the misrepresentations as alleged and the statements were merely manufactured without belief in or concerns for the truth of the misrepresentations, for the purpose of inducing individuals to vote, by fraudulent means, within the meaning of section 256(2) of the Election Act, to elect the candidates endorsed by the N.D.P.
51. The Petitioners, Friesen, Kuzenko, Umbarger, and the voters were caused and induced to vote for the candidates endorsed by the N.D.P. by the aforesaid fraudulent misrepresentations and had they known the truth they would not have voted for the said candidates.

